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Supreme Court, U.S.
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No. 92-779

In The

Supreme Court of the United States

October Term, 1992

CARLTON JOHNSON, et al.,

Petitioners,

vs.

WEBB THOMPSON, M.D., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals erred in its determination that a claim pursuant to § 504 of the Rehabilitation Act of 1973 was properly dismissed where plaintiffs alleged discrimination in medical treatment decisions based on degree of handicap as well as socioeconomic criteria.

LIST OF PARTIES

Respondents, defendants below, confess confusion regarding Petitioners' List of Parties. Petitioners would appear to consider certain officials and employees of the Department of Human Services to be Respondents to their Petition for Writ of Certiorari notwithstanding the fact that only injunctive and declaratory relief were sought against these parties and Petitioners' List of Parties states that parties against whom injunctive and declaratory relief were sought are not Respondents. Further, the Trial Court and the Court of Appeals ruled injunctive and declaratory relief were not available in this action and this ruling has not been appealed. (App. 68.) Only injunctive and declaratory relief were sought against Drs. David Yngve, William Barnes, Harriet Coussons and Andrew Sullivan. These doctors are not Respondents to this Writ. Dr. Alan Olson was dismissed from this action because of the absence of a physician-patient privilege relationship (R. 443, R. 470) and therefore is not a Respondent. The defendant physicians who are Respondents are Drs. Gross, Thompson, Razook, Herbeck, Stuemky and Brennan (Houdesheldt).

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For The Tenth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The United States Court of Appeals for the Tenth Circuit issued its opinion (No. 90-6107) on August 6, 1992. (App. 45.) The appeal was from a number of orders by the Trial Court dismissing certain claims and certain parties and from a jury verdict and judgment entered on behalf of the remaining defendants on the remaining claims. Among the orders appealed was the Trial Court's Order dismissing plaintiffs' claims pursuant to § 504 of the Rehabilitation Act of 1973. (App. 43.) This Order was affirmed by the Court of Appeals and is the only subject

of Petitioners' Application for Writ of Certiorari. A subsequent Order by the Trial Court dismissing claims for injunctive and declaratory relief and dismissing defendant physicians Sullivan, Barnes, Coussons and Yngve, (App. 77), was also affirmed by the Court of Appeals and this ruling is not the subject of Petitioners' Application for Writ of Certiorari.

STATUTE INVOLVED

29 U.S.C. § 794 (§ 504 of the Rehabilitation Act of 1973) provides in pertinent part:

Nondiscrimination under Federal grants and programs.

(a) Promulgation of Rules and Regulations.

> No otherwise qualified individual with handicaps in the United States, as defined in Section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . . .

STATEMENT OF THE CASE

This appeal arises out of a lawsuit joining eleven federal and state claims filed against the Respondent physicians, defendants below, at Oklahoma Children's Memorial Hospital (OCMH), other defendant physicians who are not Respondents and various hospital officials and employees of the Department of Human Services

(DHS). (App. 1.) The subject of the lawsuit was the care and treatment of three newborn infants at OCMH interpreted against an article, *Early Management and Decision Making for the Treatment of Myelomeningocele*, written by one of the Respondents, Dr. Richard Gross. Petitioners Johnson, Smith, Camp and the Spina Bifida Association of America (SBAA), plaintiffs below, alleged the infants had received discriminatory treatment in medical treatment decisions because of their handicap, myelomeningocele (spina bifida), and because of socioeconomic considerations. Plaintiffs' Amended Complaint alleged: "By considering nonmedical social, economic and intellectual criteria, as well as the degree of paraplegia, in determining whether or not to treat these infants, whether or not to recommend treatment, and whether or not to provide parents or guardians with a pessimistic prognosis, the myelomeningocele team discriminated against these infants on the basis of their disabilities and on the basis of socioeconomic criteria." (App. 15, ¶ 64.) Further, plaintiffs alleged in their Amended Complaint: "[i]t was the myelomeningocele team's policy that external, i.e. nonmedical circumstances – specifically social economic and intellectual criteria, as well as the degree of paraplegia – were crucially important in deciding which infants to treat." (App. 15, ¶ 65.) Plaintiffs sought declaratory and injunctive relief, as well as money damages, for the above described conduct pursuant to § 504 of the Rehabilitation Act of 1973, among other causes of action.

The Trial Court dismissed the First Cause of Action seeking relief for allegedly discriminatory conduct pursuant to § 504 of the Rehabilitation Act. (App. 43.) Subsequently, the Trial Court granted summary judgment on

the claims for injunctive and declaratory relief and accordingly dismissed physicians Sullivan, Barnes, Coussons and Yngve against whom only declaratory and injunctive relief had been sought. (App. 77-78.)[1] The Court subsequently dismissed Alan Olson because of the absence of a physician-patient relationship. (R. 443, 470.)

The claims for violation of 42 U.S.C. § 1983, 42 U.S.C. § 289 1-3(a), 29 U.S.C. § 794 and the pendent claims for medical malpractice proceeded to trial against Drs. Gross and Thompson in the care and treatment of Melissa Camp; Drs. Stuemky and Brennan (Houdesheldt) in the care and treatment of Carlton Johnson; and Drs. Razook and Herbeck in the care and treatment of Stonewall Jackson Smith. While separate medical treatment issues for each of the defendants were addressed at trial, the article by Dr. Gross was the common thread with which plaintiffs attempted to demonstrate selective and discriminatory conduct by the doctors based on medical and nonmedical criteria. However, evidence failed to support such a conclusion. At trial at the close of plaintiffs' case, the Trial Court dismissed all claims against Drs. Herbeck and Razook (R. 477) and dismissed the federal claims against Drs. Thompson, Gross, Stuemky and Brennan (Houdesheldt). The pendent malpractice claims against these doctors were submitted to a jury which returned verdicts in their favor.

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[1] Even had the § 504 claim survived the defendants' Motion to Dismiss, the subsequent entry of partial summary judgment renders all claims for injunctive and declaratory relief under § 504 moot. There was no evidence of any discriminatory conduct *after* 1984 to support any claim for injunctive and declaratory relief.

REASONS FOR DENYING THE WRIT

THE PETITION SHOULD BE DENIED BECAUSE THE DECISION BY THE COURT OF APPEALS IS FULLY CONSISTENT WITH THE REQUIREMENTS OF § 504 OF THE REHABILITATION ACT.

The express language of § 504 of the Rehabilitation Act mandated the dismissal of plaintiffs' claim for discriminatory conduct by the physicians in making medical treatment recommendations thus making any review by this Court unnecessary. The statute provides that no otherwise qualified individual . . . shall, *solely by reason of his handicap*, be . . . subjected to discrimination under any program receiving Federal financial assistance. . . . (Emphasis added.) Plaintiffs' Amended Complaint is replete with references to treatment recommendations and treatment decisions being based on *both* medical and nonmedical criteria, i.e. presence of handicap *and* the presence of certain socioeconomic conditions. Although plaintiffs described babies being given an optimistic medical prognosis if they had a low lesion, no severe hydrocephalus and no associated anomalies and a pessimistic prognosis for babies with a high lesion, brain malformations and other brain malformations (App. 13-14, ¶¶ 57 and 58), the *essence* of plaintiffs' Amended Complaint was that Carlton Johnson, Melissa Camp and Stonewall Jackson Smith were ultimately *denied medical treatment* because of a program which relied on nonmedical factors as well as the degree of handicap. Plaintiffs claimed the denial of the benefit to which these infants were otherwise entitled was a function of both the degree of handicap and socioeconomic factors. The allegations, taken as true, for purposes of the Trial Court and Appellate

Court's ruling under Fed.R.Civ.P. 12(b)(6) included the following:

> By considering nonmedical social, economic and intellectual criteria, as well as the degree of paraplegia, in determining whether or not to treat these infants, whether or not to recommend treatment, and whether or not to provide parents or guardians with a pessimistic prognosis, the myelomeningocele team discriminated against these infants on the basis of their disabilities and on the basis of socioeconomic criteria. (App. 15, ¶ 64.)
>
> It was the myelomeningocele team's policy that external, i.e. nonmedical circumstances – specifically social economic and intellectual criteria, as well as the degree of paraplegia – were crucially important in deciding which infants to treat. (App. 15, ¶ 65.)

As the Court of Appeals recognized, to make a claim under § 504 a plaintiff must prove (1) he is a handicapped individual, (2) he is "otherwise qualified" for the benefit sought, (3) he was discriminated against solely by reason of his handicap, and (4) the program or activity in question receives federal financial assistance. *Clark v. Cohen*, 613 F. Supp. 684 (E.D. Pa. 1985), *aff'd* 794 F.2d 79 (3rd Cir.), *cert. denied* 479 U.S. 962 (1986). By the very language of the Amended Complaint, the alleged discrimination was a function of socioeconomic factors in addition to the presence of a handicap. Where a complaint does not properly allege that plaintiffs were discriminated against "solely" because of their handicaps the action must be dismissed. *Plummer v. Branstad*, 731 F.2d 574, 579 (8th Cir. 1984); *Clark v. Cohen*, 613 F. Supp. at 693; *Gieseking v.*

Schafer, 672 F. Supp. 1249 (W.D. Mo. 1987). The Tenth Circuit's unanimous ruling in this case is consistent with the language of the statute and with case law interpreting the statute and does not present any conflict worthy of this Court's attention.

Section 504 regulates the conduct of *recipients* of federal financial assistance and an action will lie against a private party under § 504 only if that party is a recipient. *Lemmo v. Willson*, 583 F. Supp. 557, 559 (D. Colo. 1984). Officials and employees of Children's Memorial Hospital and the Department of Human Services who were parties to the action below and against whom injunctive and declaratory relief were sought, are not Respondents to the Petition for review. (See List of Parties, p. ii.) Thus, the "recipients" of federal funding are no longer parties to this appeal. While the Amended Complaint makes vague references to "services provided to plaintiffs at Oklahoma Children's Memorial Hospital" and to the research project receiving federal financial assistance, the Amended Complaint is silent as to any federal funding received *by the physicians* for their experimental research program. In *Glanz v. Vernick*, 755 F. Supp. 632 (D. Mass. 1991), the District Court examined whether a physician faculty member, who participated in a federally funded program at Beth Israel Hospital, was a recipient of federal financial assistance under § 504 in a claim by an AIDS patient for refusal to perform surgery. The Court answered in the negative and held that by limiting coverage to recipients, Congress imposes the obligations of a § 504 claim upon those who are in a position to accept or reject those obligations as part of the decision whether or not to receive federal funds, citing *United States Department of*

Transportation v. Paralyzed Veterans of America, 477 U.S. 597 (1986). Plaintiffs in the instant case alleged no facts to demonstrate the physician defendants were in a position to accept or reject funding for the program complained of and, like the physician in *Glanz*, cannot be held liable under § 504 for participation in an allegedly federally funded program. *Glanz*, 756 F. Supp. at 637. Although Respondents disagree with the holding in *Glanz* that § 504 applies to medical treatment decisions, the Court in *Glanz* correctly interpreted the requirement for federal funding under this Court's ruling in *Paralyzed Veterans of America, supra*, and the Court of Appeals' decision in the instant case is correct for the same reason. The Petition for Writ of Certiorari should be denied.

Because the Petitioners have abandoned any review of dismissal of claims under § 504 seeking injunctive and declaratory relief, the only remaining remedy is a claim for compensatory damages under § 504. Respondents submit that in addition to the foregoing reasons militating against application of § 504 in this case is the argument that compensatory damages are not an appropriate remedy under § 504.[2] Section 504 was not meant to create a new species of statutory torts with a full array of monetary remedies. *Eastman v. Virginia Polytechnic Institute and State University*, 939 F.2d 204, 208 (4th Cir. 1991). Dismissal of the § 504 claim, as affirmed by the Tenth Circuit, was therefore appropriate under Fed. R. Civ. P.

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[2] Respondents are mindful of the fact that this Court has not decided the specific nature of recoverable damages under § 504. *Smith v. Robinson*, 448 U.S. 992, 1020, 104 S.Ct. 3457 (1984).

12(b)(6) because the judicial relief now remaining, i.e. compensatory damages, makes the claim moot.

Finally, the Court of Appeals' decision in this case is proper because the Rehabilitation Act does not apply to medical treatment decisions involving newborn infants. As the Court of Appeals for the Second Circuit concluded after a lengthy and exhaustive study of legislative history, medical treatment decisions were not the focus of Congress in passing § 504 into law. *United States v. University Hospital, State University of New York*, 729 F.2d 144 (2nd Cir. 1984).[3] In their Brief, Petitioners rely on selective language of a 1974 Senate Report accompanying the amendments to the statute as an expression of legislative intent. Particularly telling, however, is the full context in which the language appears:

> Section 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit

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[3] The underlying medical facts in *University Hospital* are similar to the case at bar. The infant in *University Hospital* had myelomeningocele, microcephaly and hydrocephalus and other physical and mental defects. After a series of state appellate actions, it was held that the parents' decision not to treat the child was in the child's best interests. Federal litigation ensued when the Secretary of HHS sought access to medical records which the hospital had refused to produce, alleging a violation of the Rehabilitation Act. The parents intervened as defendants and both the parents and the hospital moved to dismiss the complaint arguing § 504 did not reach decisions involving health care services to newborns. *University Hospital, supra*, 729 F.2d at 146-148.

> from, vocational rehabilitation services, in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided programs. Examples of handicapped individuals who may suffer discrimination in receipt of Federally-assisted services but who may have been unintentionally excluded from the protection of Section 504 by the references to enhanced employability Section 7(6) are as follows: physically or mentally handicapped children who may be denied admission to Federally-supported school systems on the basis of their handicap; handicapped persons who may be denied admission to Federally-assisted nursing homes on the basis of their handicap; those persons whose handicap is so severe that employment is not feasible but who may be denied the benefits of a wide range of Federal programs; and those persons whose vocational rehabilitation is complete but who may nevertheless be discriminated against in certain Federally-assisted activities.

The Court in *University Hospital* concluded that legislative history focused on discrimination in the denial of *access* and *admission* to federal programs, and *not* the *monitoring* of medical treatment decisions for newborns, agreeing with the holding in *American Academy of Pediatrics v. Heckler*, 561 F. Supp. 395 (D.D.C. 1983). Similarly, as the Court in *University Hospital* notes, post-enactment legislative history supports the view that "Congress never envisioned HEW (or HHS) would attempt to apply Section 504 to treatment decisions." *University Hospital, supra*, 729 F.2d at 159. As this Court said in *Bowen v. American Hospital Association*, 476 U.S. 610, 106 S.Ct. 2101, 2121 (1986), "Congress has failed to indicate either in the

statute or in the legislative history, that it envisioned federal superintendence of treatment decisions traditionally entrusted to state governance." Certainly, the absence of any legislative history suggesting application of § 504 to medical treatment decisions is equally illustrative of congressional intent regardless of whether the action involved is an enforcement action as in the instant case, or a challenge to regulations, as in *Bowen*.

It is significant that this Court in *Bowen* was examining Final Rules, promulgated on January 12, 1984 by the Secretary of the Department of Health and Human Services establishing procedures relating to health care for handicapped infants. However, prior to the enactment of these rules, and *prior to the events* giving rise to this lawsuit, federal enforcement of § 504 for discrimination in treatment decisions involving newborns was simply not recognized. This Court said in *Bowen*:

> Prior to the regulatory activity culminating in the Final Rules, the Federal Government was not a participant in the process of making treatment decisions for newborn infants. We presume that this general framework was familiar to Congress when it enacted § 504.

Bowen, supra, 476 U.S. 610, 106 S.Ct. 2101, 2113.

Thus, because plaintiffs' Amended Complaint in the instant case alleged discriminatory treatment in treatment decisions for babies born in 1978, 1979 and 1982 (App. 21, ¶ 95; App. 20, ¶ 92; and App. 11, ¶ 46), the conduct complained of predated even any arguable application of § 504 to medical treatment decisions and any possible enforcement action under § 504. Dismissal of the § 504

claim was consistent with this Court's ruling in *Bowen* and for this reason does not require review.

The Court in *University Hospital* also examined the statutory language of § 504 and found that the requirements of "otherwise qualified" was not amenable to application in medical treatment decision making. Consistent with the Court's findings regarding legislative history, the Court also found the phrase "otherwise qualified" "cannot be applied in the comparatively fluid context of medical treatment decisions without distorting its plain meaning." *University Hospital, supra*, 729 F.2d at 156. As the Court pointed out, "one would not ordinarily think of a newborn infant suffering from multiple birth defects as being "otherwise qualified" to have corrective surgery performed or to have a hospital initiate litigation seeking to override a decision against surgery by the infant's parents. *Id.*[4] Finally, the Court in *University*

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[4] Petitioners attempt to create some conflict between the Court of Appeals' reasoning in the instant case and this Court's holding in *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361 (1979). In *Southeastern Community College*, this Court was concerned with the "qualifications" of a handicapped student seeking admission to a federally funded nursing program. The Court decided "otherwise qualified" meant one who is able to meet all of the programs' requirements in spite of her handicap and did not mean that an admission decision should be made *without regard* to her disability. Further, the Court said:

> A person who has a record of, or is regarded as having an impairment may at present have no actual incapacity at all. Such a person would be exactly the kind of individual who could be "otherwise qualified" to participate in covered programs. And a person who suffers from a limiting or physical or mental

Hospital explained that the medical treatment decision simply did not fit within the "subjected to discrimination language" of § 504. "Where the handicapping condition is related to the condition to be treated, it will rarely, if ever, be possible to say with certainty that a particular decision was discriminatory. *Id.* at 157.

Relying on *University Hospital* and *Bowen*, the District Court in *Ross v. Hilltop Rehabilitation Hospital*, 676 F. Supp. 1528, 1539 (Colo. 1987) found that the Rehabilitation Act does not apply to medical treatment decisions of a physically handicapped individual who requests his treating physician and hospital terminate his medical treatment. And in *Jackson v. Fort Stanton Hospital and Training School*, 757 F. Supp. 1243, 1297 (D.N.M. 1990), 964 F.2d 980 (10th Cir. 1992) (reversed on other grounds), the Court concluded, again citing *Bowen* and *University Hospital*, that "medical treatment decisions are generally immune from scrutiny under Section 504." The decision by the Tenth Circuit in the instant case is consistent with this same reasoning and does not present a question for this Court's review.

The argument against permitting a new federal tort to address medical treatment decisions under § 504 is all

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impairment still may possess other abilities that permit him to meet the requirements of various programs.

Id. at 2367, fn. 6. It is clear this Court was concerned with admission to or access to a federal program. The Court did not speak to nor anticipate medical treatment decisions, and, the very nature of those decisions is why the language of the statute cannot be meaningfully applied.

the more compelling in light of the alternative state remedies available, and indeed pursued by plaintiffs in the instant case, for compensatory damages. Both failure to provide necessary medical treatment within acceptable standards of care, *Reeg v. Shaughnessy*, 570 F.2d 309 (10th Cir. 1978); *Runyon v. Reed*, 510 P.2d 943 (Okla. 1973); *McCarroll v. Reed*, 679 P.2d 851 (Okla. Ct. App. 1983), and failure to adequately inform of medical treatment options, *Scott v. Bradford*, 606 P.2d 554 (Okla. 1979) are cognizable claims long-recognized under Oklahoma law. The existence of such authority is contrary to Petitioners' suggestion that to deny a claim under § 504 is to leave a handicapped infant defenseless and without redress.

CONCLUSION

Under the rulings of *University Hospital, supra*, and *Bowen, supra*, and in light of the express statutory language and legislative history of § 504 of the Rehabilitation Act of 1973, the Court of Appeals for the Tenth Circuit reached a reasonable and permissible result. The Amended Complaint pled facts which excluded any redress under § 504, and the ruling by the Court of

Appeals does not present a conflict which merits this Court's attention.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CARLTON JOHNSON by SHARON JOHNSON as his next friend; SHARON JOHNSON; STONEWALL JACKSON SMITH, deceased by and through FRIEDA SMITH and JOHN SMITH; MELISSA CAMP, decreased, by and through CHEPARNEY CAMP; THE SPINA BIFIDA ASSOCIATION OF AMERICA; and THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS; individually and on behalf of others similarly situated, Plaintiffs, v. RICHARD H. GROSS, M.D., in his individual capacity; J. ANDREW SULLIVAN, M.D., DAVID YNGVE, M.D., WILLIAM BARNES, M.D., HARRIET COUSSONS, M.D., LAURA TULL, R.N., RUTH TATYREK, M.S.W., all in their individual and official capacities; WEBB THOMPSON, M.D., Chief of Staff and Medical Director Oklahoma Children's Memorial Hospital, in his individual and official capacity; DANIEL DOENITY, Administrator, Oklahoma Children's Memorial Hospital, in his individual and	No. CIV-85-2434-A (Filed Jul 14 1986)

official capacities, JERRY D. RAZOOK, M.D., Attending Assistant Professor of Pediatrics, Pediatric Cardiology Service, Oklahoma Children's Memorial Hospital in his individual capacity; GREGORY HERBECK, M.D., Intern Department of Pediatrics, Oklahoma Children's Memorial Hospital, in his individual capacity; ANTONIO PADILLA, Chief Executive Officer, Oklahoma Teaching Hospitals, in his individual and official capacities; ROBERT FULTON, Director of Human Services in his individual and official capacities; REGINALD BARNES, W.E. FARHAS, ALBERT FURR, ROBERT M. GREER, JANE HARTLEY, DAVID L. WALTERS, JOHN E. ORR, TRAVIS HARRIS, and WAYNE CHANDLER, members of the Oklahoma Commission for Human Services, all in their individual and official capacities; ALLAN OLSON, M.D., MICHAEL P. MORRIS, M.D.; JOHN STUEMKY, M.D., CYNTHIA HOUDESHELDT, M.D., all in their individual capacities; THOMAS PRATT, M.D., J. PATRICK LIVINGSTON, M.D.; W.J. CRAIG, M.D., all in their individual capacities; and CHILDREN'S SHELTER, INC., an Oklahoma corporation,

Defendants.

FIRST AMENDED COMPLAINT

Plaintiffs, by their attorneys, for their complaint, allege upon information and belief:

1. This is an action for declaratory and injunctive relief against unlawful discrimination at Oklahoma Children's Memorial Hospital and for damages against individuals to compensate for such conduct.

JURISDICTION AND VENUE

2. This is an action under the Civil Rights Acts of 1871 and 1976, 42 U.S.C. §§1983, 1985, and 1988 to redress the deprivation under color of statute, ordinance, regulation, custom or usage of the State of Oklahoma of rights secured to the Plaintiffs by the Fourteenth Amendment to the Constitution of the United States, by 42 U.S.C. §289 1-3 (A), and by the Rehabilitation Act of 1973, 28 U.S.C. §794. Jurisdiction is conferred on this Court by 28 U.S.C. §1343(a)(1), (3) & (4), and by 28 U.S.C. §1331. This Court has pendent jurisdiction of Plaintiffs' state law claims of wrongful death, pursuant to 12 Okla. Stat. Ann. §1053, and medical malpractice.

3. Venue is properly laid in this district pursuant to 28 U.S.C. §1391(c).

THE PARTIES

4. Plaintiff Carlton Johnson is a three year old male who was denied beneficial medical treatment at Oklahoma Children's Memorial Hospital.

5. Plaintiff Sharon Johnson is the natural mother of Carlton Johnson.

6. Plaintiffs Frieda Smith and John Smith are the surviving parents of, and on behalf of, Stonewall Jackson Smith, a deceased infant.

7. Plaintiff Cheparney Camp is the surviving parent of, and on behalf of, Melissa Camp, a deceased infant.

8. Plaintiff the Spina Bifida Association of America (SBAA), organized in 1972, seeks to increase public awareness and understanding of Spina Bifida. Spina Bifida is a spinal malformation; myelomeningocele is a type of Spina Bifida. SBAA's membership consists of adults and children with this congenital malformation, their parents, and professionals involved in the care of, or provision of services to, individuals with Spina Bifida. The SBAA conducts national conferences with seminars on scientific, social, medical, and educational matters; it provides support to individuals and families through a network of 106 chapters. SBAA has more than 9,000 members throughout the country. These members will be directly affected by the policies and actions of the Defendants. SBAA has been directly involved in the issue of medical care and treatment for children with other disability rights organizations that co-authored and signed the *Principles of Treatment of Disabled Infants* on November 29, 1983, together with three national medical groups.

9. Plaintiff The Association for Persons with Severe Handicaps (TASH) formerly the American Association for the Education of the Severely/Profoundly Handicapped) was founded in 1974 to develop, advocate, and implement federal statutes benefiting individuals with severe

or profound handicaps. TASH now has more than six thousand members in Oklahoma and throughout the country who include parents, physicians, educators, therapists, and other professionals. TASH members are and will be directly affected by the policies and action of the Defendants. TASH has been directly involved in the issue of medical care and treatment for children with disabilities. *See Legal, Economic, Psychological and Moral Considerations on the Practice of Withholding Treatment from Infants with Congenital Defects* (TASH Monograph #1, 1984). Many of its members provide such care and treatment.

10. Defendant Richard H. Gross, M.D., was a member of the Oklahoma Children's Memorial Hospital myelomenigocele team, staff of the Department of Orthopedic Surgery, and consulting physician for Melissa Camp, a deceased infant.

11. Defendant J. Andrew Sullivan, M.D., is the Chief of Pediatric Orthopaedics at Oklahoma Children's Memorial Hospital and a member of the hospital's myelomeningocele team.

12. Defendant David Yngve, M.D., is a member of the Department of Pediatric Orthopaedics at Oklahoma Children's Memorial Hospital and a member of the hospital's myelomeningocele team.

13. Defendant William Barnes, M.D., is a urologist and a member of the Oklahoma Children's Memorial Hospital myelomeningocele team.

14. Defendant Harriet Coussons, M.D., is a pediatrician and a member of the Oklahoma Children's Memorial Hospital myelomeningocele team.

15. Defendant Laura Tull, R.N., is a program coordinator of the Oklahoma Children's Memorial Hospital Myelomeningocele team.

16. Defendant Ruth Tatyrek, M.S.W., is a member of the Department of Social Service, Oklahoma Children's Memorial Hospital, and a member of the hospital's myelomeningocele team.

17. Defendant Webb Thompson, M.D., is Chief of Staff and Medical Director at Oklahoma Children's Memorial Hospital, and attending physician to Melissa Camp, a deceased infant.

18. Defendant Daniel Doenity is Administrator of Oklahoma Children's Memorial Hospital.

19. Defendant Jerry D. Razook, M.D., was a member of the Pediatric Cardiology Service at Oklahoma Children's Memorial Hospital. He was an attending physician assigned to care for Stonewall Jackson Smith, a deceased infant.

20. Defendant Gregory Herbeck, M.D., was an intern in the Department of Pediatrics at Oklahoma Children's Memorial Hospital. He was assigned to care for Stonewall Jackson Smith, a deceased infant.

21. Defendant Antonio Padilla is Chief Executive Officer for Oklahoma Teaching Hospitals.

22. Defendant Robert Fulton is Director of the Oklahoma Department of Human Services, which owns and operates the Oklahoma Teaching Hospitals, including Oklahoma Children's Memorial Hospital.

23. Defendants David L. Walters, Reginald Barnes, W.E. Farhas, Albert Furr, Robert M. Greer, Jane Hartley, John E. Orr, Travis Harris, and Wayne Chandler are the members of the Oklahoma Commission for Human Services, which serves as the governing board for Oklahoma Children's Memorial Hospital. David L. Walters is Chairman of the Commission.

24. Defendant Allan Olson, M.D., is a member of the Oklahoma Children's Memorial Hospital Department of Pediatrics, and was the attending physician for Plaintiff Carlton Johnson during the days immediately following his birth.

25. Defendant Michael P. Morris, M.D., was an intern with the Oklahoma Children's Memorial Hospital Department of Pediatrics and was assigned to care for Plaintiff Carlton Johnson during the days immediately following his birth.

28. John Stuemky, M.D., was an Associate Professor in the Department of Pediatrics between October 17, 1982, and October 20, 1982. He was the attending physician assigned to care for Plaintiff Carlton Johnson during that time.

27. Cynthia Houdesheldt, M.D., was an intern in the Department of Family Practice between October 17, 1982, and October 20, 1982. She was assigned to care for Plaintiff Carlton Johnson.

28. Thomas Pratt, M.D., was an intern in the Department of Pediatrics, Oklahoma Children's Hospital between February 3, 1978, and February 9, 1978, and was a treating physician for Melissa Camp, a deceased infant.

29. J. Patrick Livingston, M.D., was a resident in the Department of Orthopaedic Surgery, Oklahoma Children's Memorial Hospital between February 3, 1978, and February 9, 1978, and was a consulting physician for Melissa Camp, a deceased infant.

30. William J. Craig, M.D., was a treating physician for Melissa Camp, a deceased infant, from February 9, 1978, until her death on May 11, 1978.

31. Children's Shelter, Inc., is an Oklahoma corporation that between 1978 and 1983 provided residential, custodial, and nursing services to Plaintiff Carlton Johnson and to deceased infants Stonewall Jackson Smith and Melissa Camp.

CLASS ALLEGATIONS

32. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all children with myelomeningocele who have been, are, or may in the future by evaluated or treated by the myelomeningocele team or its members at Oklahoma Children's Memorial Hospital and on behalf of their parents and legal guardians. The members of this class are so numerous that joinder of all members is impracticable. There are questions of law and fact involved common to the class, the claims of the Plaintiffs as representative parties are typical of the claims of the class, and the Plaintiffs as representative parties will fairly and adequately protect the interests of the class. The prosecution of separate actions by individual members of the class would create a risk of (a) inconsistent or varying adjudications with respect to individual members of the class

which would establish incompatible standards of conduct for the Defendants, and (b) adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impare or impede their ability to protect their interests. Defendants have acted, in all respects stated herein, on grounds generally applicable to the class, thereby making appropriate final declaratory and injunctive relief with respect to the class as a whole.

FIRST CAUSE OF ACTION

Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 32 as fully set forth herein.

33. Oklahoma Children's Memorial Hospital, one of the Oklahoma Teaching Hospitals, is owned and operated by the State of Oklahoma.

34. The University of Oklahoma is owned and operated by the State of Oklahoma.

35. Defendants are or have been agents, employees, or contractors of the State of Oklahoma or individuals or entities acting in concert with the agents, employees, or contractors of the State of Oklahoma, and act or have acted under color of State law.

36. Defendants directly and actively participated in the discriminatory selection program practiced at Oklahoma Children's Memorial Hospital.

37. Services provided to Plaintiffs at Oklahoma Children's Memorial Hospital receive federal financial

assistance, including Medicaid funds, and grants and contracts from the United States Department of Health and Human Services.

38. In October, 1983, an experimental research program of early selection for treatment or nontreatment of infants born with myelomeningocele that took place at Oklahoma Children's Memorial Hospital was described in the medical journal *Pediatrics*. The report encompassed the five year period between 1977 and 1982. Gross, Cox, Tatyrek, Pollay & Barnes, *Early Management and Decision Making for the Treatment of Myelomeningocele,* 72 Pediatrics 450 (1983).

39. This ongoing research project and related activities began in 1977; it was and is funded in part by federal financial assistance and by grants and contracts from the United States Department of Health and Human Services.

40. This ongoing research project to which the Plaintiff Carlton Johnson and deceased infants Stonewall Jackson Smith and Melissa Camp have been subjected has not been approved by an Institutional Review Board as required by federal statutes, rules, and regulations.

41. The parents and guardians of the human subjects involved, including Plaintiff Sharon Johnson, mother of Plaintiff Carlton Johnson, Plaintiffs Frieda Smith and John Smith, parents of Stonewall Jackson Smith, decesased infant, and Plaintiff Cheparney Camp, parent of Melissa Camp, deceased infant, were not informed that their infants were participating in experimental research; they have not given their informed consent to their infants' participation.

42. The research project included a selection process applied to infants born with myelomeningocele. A congenital disability, myelomeningocele is characterized by an opening in the spine at which a "sac" protrudes from the body of the child. This sac contains cerebrospinal fluid and nerve roots that would normally be contained within the spinal column.

43. Beneficial medical treatment of the myelomeningocele consists of prompt surgical closure of the defect, preferably within 48 hours after birth, to prevent meningeal infection.

44. If treated, most children with myelomeningocele will be ambulatory – they may walk with braces or crutches, or may use a wheelchair.

45. Mental retardation is not directly associated with myelomeningocele if it is properly treated; myelomeningocele does not preclude independent existence.

46. Plaintiff Carlton Johnson was born at Oklahoma Memorial Hospital, one of the Oklahoma Teaching Hospitals, on September 12, 1982. He was diagnosed to have myelomeningocele, hydrocephalus, microcephaly, and anemia.

47. Plaintiff Carlton Johnson was transferred to Oklahoma Children's Memorial Hospital approximately twelve hours after his birth.

48. Hydrocephalus, a potentially serious anomaly often associated with myelomeningocele, occurs when

too much cerebrospinal fluid accumulates within the cranium. If untreated, this condition causes the head to greatly enlarge and damages the developing brain.

49. Treatment for hydrocephalus normally involves placement of a shunt that drains the excess fluid into another body cavity, most commonly the abdomen.

50. Mental retardation sometimes occurs in infants with hydrocephalus; however, the mere presence of hydrocephalus does not necessarily indicate deceased intellectual capacity, and it does not preclude independent existence.

51. Beneficial medical treatment for Plaintiff Carlton Johnson would have included surgery to close his spinal lesion and placing a shunt to treat his hydrocephalus.

52. The experimental and discriminatory selection process at Oklahoma Children's Memorial Hospital that Plaintiffs Carlton Johnson and deceased infants Stonewall Jackson Smith and Melissa Camp were subjected to was used to determine which infants were to receive "vigorous treatment" – that is, beneficial medical treatment – and which infants were to receive "supportive care" – that is, the denial of beneficial medical treatment predictably leading to the death of the infant.

53. The experimental and discriminatory selection process at Oklahoma Children's Memorial Hospital that Plaintiffs Carlton Johnson and deceased infants Stonewall Jackson Smith and Melissa Camp were subjected to was used to determine which parents or guardians were to receive pessimistic prognoses for their children in order

to induce them to follow the myelomeningocele team's recommendation for "supportive care" only.

54. When an infant with myelomeningocele such as Plaintiff Carlton Johnson was presented to Oklahoma Children's Memorial Hospital, a "team" – consisting of a physician's assistant, a pediatrician, an orthopedist, a neurosurgeon, a urologist, a nurse clinician, a social worker, physical and occupational therapists, and a psychologist – screened the child and the child's family; various diagnostic tests were performed.

55. The myelomeningocele team gave the parents or guardians of infants with high lumbar or thoracic level lesions, severe hydrocephalus, and other associated anomalies a pessimistic evaluation and prognosis based upon the infant's handicaps.

56. If the team's assessment of the degree of the infant's ambulatory potential and the degree of intellectual impairment were pessimistic, then parents or guardians were informed that the team did not regard beneficial treatment to be obligatory. Parents and guardians were not informed that the team did not regard beneficial treatment to be obligatory if the team's assessment of the degree of the infant's ambulatory potential and the degree of intellectual impairment was other than pessimistic.

57. If the child with myelomeningocele was found to have a lower lumbar or sacral lesion and no severe hydrocephalus or if there were no associated anomalies present, then an optimistic prognosis was presented and sac closure was recommended by the team to the parents or guardians to be performed within a few days.

58. If the lesion was at a high lumbar or thoracic level, if severe hydrocephalus or other brain malformations were present and/or if other associated anomalies were noted, then a more formal meeting of the myelomeningocele team was scheduled within 48 hours of admission. The use of these criteria discriminated against Plaintiff infants on the basis of their projected physical and mental disabilities.

59. Infants considered to have a poor prognosis – and who are therefore recommended for non-treatment – have a survival rate equal to those of infants with a good prognosis – and who are therefore recommended for treatment – if they receive early surgical treatment.

60. The infants who, as a result of the formal team meeting, were denied access to beneficial medical treatment had identical prospects for survival as those infants who were provided with beneficial medical treatment

61. At the formal team meeting, the myelomeningocele team considered the presence of any one of the following as an indication for nontreatment: (1) thoracolumbar lesion; (2) severe paraplegia; (3) gross enlargement of the head; (4) kyphosis (abnormal curvature of the spine); or (5) other severe congenital defects or birth injuries.

62. At the formal team meeting, the myelomeningocele team also considered the presence of the following as indications for treatment or, in their absence, nontreatment: (1) frontal cerebral mantle greater than 1.0 centimeter or brain mass greater than 60% mean for the infants age; (2) absence of a systemic disorder that could cause hydrocephalus and severe brain

malfunction; (3) absence of roentgenorgraphic (x-ray) and neurologic signs of severe brain deformity; (4) absence of noteworthy central nervous system bleeding and infection; (5) absence of major malformations that would preclude self-care as an adult; and (6) whether the family had sufficient economic and intellectual resources and lived within reach of an appropriate medical facility, or whether there was a commitment by a social agency to provide needed resources such as a foster home or medical care costs.

63. The myelomeningocele team's determinations were also influenced by a formula – QL = NE x (H+S). In the formula, QL is quality of life, NE is the patient's natural endowment, both physical and intellectual, H is the contribution from home and family, and S is the contribution from society.

64. By considering nonmedical social, economic, and intellectual criteria, as well as the degree of paraplegia, in determining whether or not to treat these infants, whether or not to recommend treatment, and whether or not to provide parents or guardians with a pessimistic prognosis, the myelomeningocele team discriminated against these infants on the basis of their disabilities and on the basis of socio-economic criteria.

65. It was the myelomeningocele team's policy that external, *i.e.*, nonmedical, circumstances – specifically social, economic, and intellectual criteria, as well as the degree of paraplegia – were crucially important in deciding which infants to treat. Thus, the treatment recommendation for infants with identical medical conditions were

sometimes quite different, depending on the nonmedical circumstances of the child and his or her family.

66. Following their evaluation, the myelomeningocele team made a recommendation to the parents or guardians for either "supportive care" or "vigorous treatment".

67. "Vigorous treatment" consisted of prompt sac closure (and thus prevention of infection), the placing of a shunt if hydrocephalus were present, and all other indicated beneficial medical treatment.

68. "Supportive care" consisted of keeping the infant comfortable until death occurred. There was no surgery to close the opening in the infant's back. When hydrocephalus was present, the cerebrospinal fluid was allowed to accumulate causing gross enlargement of the infant's head and compression of the brain. Antibiotics were not given for infection and sedation was not prescribed.

69. Parents or guardians were not informed that nonmedical social and economic factors entered into the recommendation.

70. Parents or guardians were not provided sufficient information to allow them to render voluntary and informed consent to treatment or to nontreatment.

71. Although the myelomeningocele team nominally left the final decision for either treatment or nontreatment to the parents or guardian, the members of the myelomeningocele team were the true decisionmakers at Oklahoma Children's Memorial Hospital, not parents or guardian.

72. Medical records of Melissa Camp state that "[t]he parents were informed of the decision not to operate, and were counseled per the decision."

73. Plaintiff Carlton Johnson was evaluated by the myelomeningocele team shortly after his birth. Progress notes made by myelomeningocele team members in Carlton's medical records stated that he was "not a good baby" and that "neurosurgery [was] not enthusiastic about shunting the child and closing the defect."

74. Members of the myelomeningocele team told Plaintiff Sharon Johnson that even with surgery and a shunt Plaintiff Carlton would only live about a year; they recommended nontreatment.

75. The information given Plaintiff Sharon Johnson and on which she based her decision to follow the team's recommendation was unbalanced, incomplete, and inaccurate; she was not given adequate information to make a reasoned and informed decision.

76. Plaintiff Sharon Johnson was intentionally not informed that nonmedical social and economic criteria were considered by the myelomeningocele team in making their recommendation for nontreatment of Plaintiff Carlton Johnson.

77. Once it was determined that Plaintiff Carlton Johnson would be denied access to beneficial medical treatment, he was transferred to the Children's Shelter for custodial care in accordance with procedure of the Defendants to transfer those infants who were deliberately denied beneficial medical care to either Children's Shelter, Inc., or to Bethany Convalescent Home, Inc.

78. Plaintiff Carlton Johnson's medical expenses at Oklahoma Children's Memorial Hospital and at the Children's Shelter were paid by Medicaid.

79. Defendant Children's Shelter, Inc., deliberately conspired with the myelomeningocele team and its members to withhold, and did withhold, beneficial medical treatment from Plaintiff Carlton Johnson and material information from Plaintiff Sharon Johnson.

80. The children recommended for nontreatment and placed at Children's Shelter and at Bethany Convalescent Home, including Plaintiff Carlton Johnson, were scheduled for and received and continue to receive follow-up care in the out-patient clinics of Oklahoma Children's Memorial Hospital.

81. The health care providers at the out-patient clinic follow the same course of nontreatment initially recommended by the myelomeningocele team.

82. Parents or guardians of infants – including Carl ton Johnson, Stonewall Jackson Smith, and Melissa Camp – would have consented to beneficial medical treatment for their infants if they had been provided nondiscriminatorily with balanced, complete, and accurate information.

83. By failure to provide parents or guardians with balanced, complete and accurate information, the parents or guardians were effectively deprived of their right to care and custody of their infants and their parent-child relationships were vitiated.

84. The Plaintiff infants recommended for nontreatment were also denied beneficial medical treatment for

conditions totally unrelated to their congenital disabilities.

85. Parents or guardians who initially and nominally refused to consent to surgical repair of the myelomeningocele and associated anomolies were not informed that their refusal was deemed by the Defendants to encompass denial of other usual and customary medical treatments for their infants, including the use of appropriate antibiotics and sedation. Until recently, Plaintiffs did not and could not discover that Defendants had effectively deprived the infants of beneficial medical care and had effectively deprived parents and guardians of the parent-child relationship.

86. On October 17, 1982, Plaintiff Carlton Johnson returned to Oklahoma Children's Memorial Hospital in severe respiratory distress. He also was dehydrated and had an ear infection. Physician's orders issued by Defendants stated there were to be no laboratory test to monitor his condition; there were to be no intravenous fluids to correct the dehydration; there were to be antibiotics for his ear infection. If Plaintiff Carlton were to suffer a cardiopulmonary arrest, then he was not to be put on a respirator and no drugs were to be used.

87. A nonhandicapped child or a handicapped child with different social and economic status, or with a different prognosis for intellectual capacity or degree of paraplegia, and with dehydration and severe respiratory distress would have been provided intravenous fluids and antibiotics; he or she would have been resuscitated following cardiopulmonary arrest.

88. Despite this lack of medical care, Plaintiff Carlton did improve and was transferred back to the Defendant Children's Shelter.

89. Surgery to close the lesion and to place shunt was not performed until January, 1984.

90. As a result of the delay in beneficial medical treatment caused by Defendant's actions, Plaintiff Carlton Johnson's head remains greatly enlarged. In addition, Plaintiff Carlton has incurred substantial physical and mental disabilities and requires constant custodial health care.

91. Plaintiff Carlton Johnson is presently at Bethany Convalescent Center in Bethany, Oklahoma. He remains in the follow-up program of Oklahoma Children's Memorial Hospital and will be referred there for acute care. His expenses continue to be paid by Medicaid.

92. On or about the period of April 16, 1979, through June 7, 1979, at Oklahoma Memorial Hospital, Oklahoma Children's Memorial Hospital, and Children's Shelter, Inc., Defendants negligently rendered or intentionally withheld, medical treatment from Stonewall Jackson Smith, a deceased infant.

93. As a result of the Defendants' actions, as described in paragraph 92, Stonewall Jackson Smith, a deceased infant, suffered great pain of mind and body, and subsequently lost his life.

94. As a result of the Defendants' actions, as described in paragraphs 92 and 93, Plaintiffs Frieda Smith and John Smith lost the companionship, services, and

enjoyment of their deceased child, Stonewall Jackson Smith.

95. On or about the period of February 3, 1978, through May 11, 1978, Oklahoma Children's Memorial Hospital, and Children's Shelter, Inc., Defendants negligently rendered medical treatment to Melissa Camp, a deceased infant, or intentionally withheld, medical treatment from Melissa Camp, a deceased infant.

96. As a result of the Defendants' actions, as described in paragraph 95, Melissa Camp, a deceased infant, suffered great pain of mind and body, and subsequently lost her life.

97. As a result of the Defendants' actions, as described in paragraphs 95 and 96, Cheparney Camp lost the companionship, services, and enjoyment of his deceased child, Melissa Camp.

98. Sixty-nine infants with myelomeningocele were seen at Oklahoma Children's Memorial Hospital between 1977 and 1982.

99. Only thirty-six (52%) of these infants were recommended for beneficial medical treatment.

100. The remaining thirty-three (48%) were recommended for nontreatment.

101. Five of the infants recommended for nontreatment by the myelomeningocele team at Oklahoma Children's Memorial Hospital nevertheless received beneficial medical treatment. Three of these children survive.

102. Three other infants recommended for nontreatment received delayed beneficial medical treatment and all three survive.

103. One infant recommended for nontreatment moved out-of-state and was lost to follow-up studies.

104. The remaining twenty-four infants recommended for nontreatment did not receive beneficial medical treatment and died.

105. This experimental and discriminatory selection process which denies infants with disabilities access to beneficial medical care has continued to the present.

106. As a result of the experimental and discriminatory selection process, the Plaintiffs suffered physical, mental and economic injuries, experiences pain and suffering, and lost rights to care and companionship.

107. This experimental and discriminatory selection process is ongoing; Plaintiffs have no adequate remedy at law.

108. Plaintiffs were and are handicapped individuals as defined by 29 U.S.C. §706(7)(b), or parents or representatives of such otherwise qualified handicapped individuals.

109. The programs and activities through which the Defendants have provided or denied medical treatment and services to Plaintiffs received and continued to receive federal financial assistance, including Medicaid.

110. Section 504 of the Rehabilitation Act of 1973 was violated when:

A. Defendants used the anticipated degree of handicap as a basis to recommend that beneficial medical treatment not be provided,

B. Defendants used the anticipated degree of handicap as a basis for providing the parents or guardians with pessimistic prognoses,

C. Defendants determined on the basis of handicap that there was a pessimistic prognosis and then subjected the infants to an evaluation based on nonmedical, socio-economic criteria, and

D. The discriminatory actions of the Defendants caused the parents or guardians to agree to deny their infants beneficial medical treatment.

111. Defendants' conduct as described was and is discrimination solely by reason of handicap which constitutes deprivation of Plaintiffs' rights secured by §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

WHEREFORE, Plaintiffs respectfully pray this Court to:

A. Find and declare that the Defendants have engaged in a policy, practice, custom and usage of unlawful conduct toward the Plaintiffs in violation of §504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and to forever enjoin Defendants, their agents, successors, and employees from engaging in such conduct.

B. Render such judgment of damages on behalf of Plaintiff Carlton Johnson, as this Court deems just and equitable against the Defendants Allan Olson, M.D., Michael Morris, M.D., John Stuemky, M.D., and Cynthia Houdesheldt, M.D., in their individual capacities;

C. Render such judgment of damages on behalf of Plaintiffs Frieda Smith and John Smith for the death of their son, Stonewall Jackson Smith, for the destruction of the parent-child relationship, and for grief and loss of companionship resulting from the death of Stonewall Jackson Smith as the Court deems just and equitable against Defendants Jerry D. Razook, M.D., Gregory Herbeck, M.D., and John Stuemky, M.D., in their individual capacities.

D. Render such judgment of damages on behalf of Plaintiff Cheparney Camp for the death of his daughter, Melissa Camp, for the destruction of the parent-child relationship and for grief and loss of companionship resulting from the death of Melissa Camp as the Court deems just and equitable against Defendants Richard H. Gross, M.D., Webb Thompson, M.D., Thomas Pratt, M.D., J. Patrick Livingston, M.D., and William Craig, M.D., in their individual capacities.

E. Allow Plaintiffs their costs herein and reasonable attorneys' fees; and

F. Allow such other, additional, or alternative relief as may appear to the Court to be equitable and just.

SECOND CAUSE OF ACTION

Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 111 as fully set forth herein.

112. Throughout the period from 1977 to the present, the research project and related activities at Oklahoma Children's Memorial Hospital through which the

Defendants provide or deny services and medical treatment to Plaintiffs has been supported in part by grants and contracts from the United States Department of Health and Human Services.

113. The project and related activities as described constituted and continue to constitute research involving human subjects.

114. The Defendants were and are conducting this research project without having submitted a proposal describing it to an Institutional Review Board, in violation of 42 U.S.C. §289 1-3(a) and 45 C.F.R. §46.103(b).

WHEREFORE, Plaintiffs respectfully pray this Court to;

A. Find and declare that the Defendants have engaged in a policy, practice, custom, and usage of unlawful conduct toward the Plaintiffs in violation of 42 U.S.C. §289 1-3(a), 45 C.F.R. §46.103(b), and the Civil Rights Act of 1871, 42 U.S.C. §1983; and to forever enjoin Defendants, their agents, successors, and employees from engaging in such conduct.

B. Render such judgment of damages on behalf of Plaintiff Carlton Johnson, as this Court deems just and equitable against Defendants Allan Olson, M.D., Michael Morris, M.D., John Stuemky, M.D., and Cynthia Houdesheldt, M.D., in their individual capacities;

C. Render such judgment of damages on behalf of Plaintiffs Frieda Smith and John Smith for the death of their son, Stonewall Jackson Smith, for the destruction of the parent-child relationship, and for grief and loss of companionship resulting from the death of Stonewall

Jackson Smith as the Court deems just and equitable against Defendants Jerry D. Razook, M.D., Gregory Herbeck, M.D., and John Stuemky, M.D., in their individual capacities;

D. Render such judgment of damages on behalf of Plaintiff Cheparney Camp for the death of his daughter, Melissa Camp, for destruction of the parent-child relationship, and for grief and loss of companionship resulting from the death of Melissa Camp as the Court deems just and equitable against Defendants Richard H. Gross, M.D., Webb Thompson, M.D., Thomas Pratt, M.D., J. Patrick Livingston, M.D., and William Craig, M.D., in their individual capacities.

E. Allow Plaintiffs their costs herein and reasonable attorneys' fees; and

F. Allow such other, additional, or alternative relief as may appear to the court to be equitable and just.

THIRD CAUSE OF ACTION

Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 114 as fully set forth herein.

115. The Defendants involve and have involved Plaintiffs in this research project without first securing the informed consent of their parents or guardians to participate in the research project in violation of 42 U.S.C. §289 1-3(a), and 45 C.F.R. §§46.116, 46.117, 46.408(b) & 46.408(d).

WHEREFORE, Plaintiffs respectfully pray this Court to:

A. Find and declare that the Defendants have engaged in a policy, practice, custom, and usage of unlawful conduct toward the Plaintiffs in violation of 42 U.S.C. §289 1-3(a), 45 C.F.R. §§46.116, 46.117, 46.408(b) & 46.408(d), and the Civil Rights Act of 1871, 42 U.S.C. §1983 and to forever enjoin Defendants, their agents, successors, and employees from engaging in such conduct.

B. Render such judgment of damages on behalf of Plaintiffs Carlton Johnson and Sharon Johnson, as this Court deems just and equitable against Defendants Allan Olson, M.D., Michael Morris, M.D., John Stuemky, M.D., and Cynthia Houdesheldt, M.D., in their individual capacities;

C. Render such judgment of damages on behalf of plaintiffs Frieda Smith and John Smith for the death of their son, Stonewall Jackson Smith, for the destruction of the parent-child relationship, and for grief and loss of companionship resulting from the death of Stonewall Jackson Smith as the Court deems just and equitable against Defendants Jerry D. Razook, M.D., Gregory Herbeck, M.D., and John Stuemky, M.D., in their individual capacities;

D. Render such judgment of damages on behalf of Plaintiff Cheparney Camp for the death of his daughter, Melissa Camp, for the destruction of the parent-child relationship and for grief and loss of companionship resulting from the death of Melissa Camp as the Court deems just and equitable against Defendants Richard H. Gross, M.D., Webb Thompson, M.D., Thomas Pratt, M.D.,

J. Patrick Livingston, M.D., and William Craig, M.D., in their individual capacities.

E. Allow Plaintiffs their costs herein and reasonable attorney's fees; and

F. Allow such other additional or alternative relief as may appear to the Court to be equitable and just.

FOURTH CAUSE OF ACTION

Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 115 as fully set forth herein.

116. Defendants were and are engaged in a conspiracy as described for the purpose of depriving Plaintiffs of the equal protection of 29 U.S.C. §794, of 45 C.F.R. Part 46, and of the Fourteenth Amendment to the Constitution of the United States.

117. Defendants' conspiracy was and is motivated by an invidiously discriminatory animus against the class of those with disabilities.

118. Defendants' conspiracy has resulted and threatens to result in injury to the persons of Plaintiffs and in depriving them of having and exercising the rights of citizens of the United States indicated in paragraph 115.

119. Defendants' conduct as described violates the Civil Rights Act of 1871, 42 U.S.C. § 1985(3).

WHEREFORE, Plaintiffs respectfully pray this Court to:

A. Find and declare that the Defendants have engaged in a policy, practice, custom, and usage of unlawful conduct toward the Plaintiffs in violation of 29 U.S.C. §794, 45 C.F.R. Part 46, the Fourteenth Amendment to the Constitution of the United States, and §1985(3) of the Civil Rights Act of 1871, 42 U.S.C. §1985(3) and to forever enjoin Defendants, their agents, successors, and employees from engaging in such conduct.

B. Render such judgment of damages on behalf of Plaintiffs Carlton Johnson and Sharon Johnson, as this Court deems just and equitable against Defendants Allan Olson, M.D., Michael Morris, M.D., John Stuemky, M.D., and Cynthia Houdesheldt, M.D., is their individual capacities.

C. Render such judgment of damages on behalf of Plaintiffs Frieda Smith and John Smith for the death of their son, Stonewall Jackson Smith, for the destruction of the parent-child relationship, and for grief and loss of companionship resulting from the death of Stonewall Jackson Smith as the Court deems just and equitable against Defendants Jerry D. Razook, M.D., Gregory Herbeck, M.D., and John Stuemky, M.D., in their individual capacities;

D. Render such judgment of damages on behalf of Plaintiff Cheparney Camp for the death of his daughter, Melissa Camp, for the destruction of the parent-child relationship, and for grief and loss of companionship resulting from the death of Melissa Camp as the Court deems just and equitable against Defendants Richard H. Gross, M.D., Webb Thompson, M.D., Thomas Pratt, M.D.,

J. Patrick Livingston, M.D., and William Craig, M.D., in their individual capacities.

E. Allow Plaintiffs their costs herein and reasonable attorneys' fees; and

F. Allow such other additional, or alternative relief as may appear to the Court to be equitable and just.

FIFTH CAUSE OF ACTION

Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 119 as fully set forth herein.

120. Defendants' conduct as described constituted and continues to constitute state deprivation of life and liberty without due process of law and without procedural due process safeguards and thus deprivation of Plaintiffs' rights secured by the Fourteenth amendment to the Constitution of the United States.

WHEREFORE, Plaintiffs respectfully pray this Court to:

A. Find and declare that the Defendants have engaged in a policy, practice, custom, and usage of unlawful conduct toward the Plaintiffs in violation of the Fourteenth Amendment to the constitution of the United States, and the Civil Rights Act of 1871, 42 U.S.C. §1983; and to forever enjoin Defendants, their agents, successors, and employees from engaging in such conduct.

B. Render such judgment of damages on behalf of Plaintiffs Carlton Johnson and Sharon Johnson, as this Court deems just and equitable against Defendants Allan

Olson, M.D., Michael Morris, M.D., John Stuemky, M.D., and Cynthia Houdesheldt, M.D., in their individual capacities.

C. Render such judgment of damages on behalf of Plaintiffs Frieda Smith and John Smith for the death of their son, Stonewall Jackson Smith, for the destruction of the parent-child relationship, and for grief and loss of companionship resulting from the death of Stonewall Jackson Smith as the Court deems just and equitable against Defendants Jerry D. Razook, M.D., Gregory Herbeck, M.D., and John Stuemky, M.D., in their individual capacities;

D. Render such judgment of damages on behalf of Plaintiff Cheparney Camp for the death of his daughter, Melissa Camp, for the destruction of the parent-child relationship, and for grief and loss of companionship resulting from the death of Melissa Camp as the Court deems just and equitable against Defendants Richard H. Gross, M.D., Webb Thompson, M.D., Thomas Pratt, M.D., J. Patrick Livingston, M.D., and William Craig, M.D., in their individual capacities.

E. Allow Plaintiffs their costs herein and reasonable attorneys' fees; and

F. Allow such other, additional, or alternative relief as may appear to the Court to be equitable and just.

SIXTH CAUSE OF ACTION

Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 120 as fully set forth herein.

121. Defendants' conduct as described constituted and continues to constitute state deprivation of life and liberty without due process of law, violating the substantive due process fundamental rights of life and liberty, and thus deprivation of Plaintiffs' rights secured by the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, Plaintiffs respectfully pray this Court to:

A. Find and declare that the Defendants have engaged in a policy, practice, custom, and usage of unlawful conduct toward the Plaintiffs in violation of the Fourteenth Amendment to the Constitution of the United States, and the Civil Rights Act of 1871, 42 U.S.C. §1983, and to forever enjoin Defendants, their agents, successors, and employees from engaging in such conduct.

B. Render such judgment of damages on behalf of Plaintiffs Carlton Johnson and Sharon Johnson as this Court deems just and equitable against the Defendants Allan Olson, M.D., Michael Morris, M.D., John Stuemky, M.D., and Cynthia Houdesheldt, M.D., in their individual capacities.

C. Render such judgment of damages on behalf of Plaintiffs Frieda Smith and John Smith for the death of their son, Stonewall Jackson Smith, for the destruction of the parent-child relationship, and for grief and loss of companionship resulting from the death of Stonewall Jackson Smith as the Court deems just and equitable against Defendants Jerry D. Razook, M.D., Gregory Herbeck, M.D., and John Stuemky, M.D., in their individual capacities;

D. Render such judgment of damages on behalf of Plaintiff Cheparney Camp for the death of his daughter, Melissa Camp, for the destruction of the parent-child relationship, and for grief and loss of companionship resulting from the death of Melissa Camp as the Court deems just and equitable against Defendants Richard H. Gross, M.D., Webb Thompson, M.D., Thomas Pratt, M.D., J. Patrick Livingston, M.D., and William Craig, M.D., in their individual capacities.

E. Allow Plaintiffs their costs herein and reasonable attorneys' fees; and

F. Allow such other, additional, or alternative relief as may appear to the Court to be equitable and just.

SEVENTH CAUSE OF ACTION

Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 121 as fully set forth herein.

122. Defendants' conduct as described constituted and continues to constitute state deprivation of life and liberty without due process of law, violating the substantive due process fundamental right of parents to the care and custody of their children, and to information concerning their children, and thus deprivation of Plaintiff's rights secured by the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, Plaintiffs respectfully pray this Court to:

A. Find and declare that the Defendants have engaged in a policy, practice, custom, and usage of

unlawful conduct toward the Plaintiffs in violation of the Fourteenth Amendment to the Constitution of the United States, and the Civil Rights Act of 1871, 42 U.S.C. §1983, and to forever enjoin Defendants, their agents, successors, and employees from engaging in such conduct.

B. Render such judgment of damages on behalf of Plaintiffs Carlton Johnson and Sharon Johnson, as this Court deems just and equitable against Defendants Allan Olson, M.D., Michael Morris, M.D., John Stuemky, M.D., and Cynthia Houdesheldt, M.D., in their individual capacities.

C. Render such judgment of damages on behalf of Plaintiffs Frieda Smith and John Smith for the death of their son, Stonewall Jackson Smith, for the destruction of the parent-child relationship, and for grief and loss of companionship resulting from the death of Stonewall Jackson Smith as the court deems just and equitable against Defendants Jerry D. Razook, M.D., Gregory Herbeck, M.D., and John Stuemky, M.D., in their individual capacities;

D. Render such judgment of damages on behalf of Plaintiff Cheparney Camp for the death of his daughter, Melissa Camp, for the destruction of the parent-child relationship, and for grief and loss of companionship resulting from the death of Melissa Camp as the Court deems just and equitable against Defendants Richard H. Gross, M.D., Webb Thompson, M.D., Thomas Pratt, M.D., J. Patrick Livingston, M.D., and William Craig, M.D., in their individual capacities.

E. Allow Plaintiffs their costs herein and reasonable attorneys' fees; and

F. Allow such other, additional, or alternative relief as may appear to the Court to equitable and just.

EIGHTH CAUSE OF ACTION

Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 122 as fully set forth herein.

123. Defendants' conduct as described constituted and continues to constitute state deprivation of equal protection of the laws, and thus deprivation of Plaintiff's rights secured by the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, Plaintiffs respectfully pray this Court to:

A. Find and declare that the Defendants have engaged in a policy, practice, custom, and usage of unlawful conduct toward the Plaintiffs in violation of the Fourteenth Amendment to the Constitution of the United States, and the Civil Rights Act of 1871, 42 U.S.C. §1983, and to forever enjoin Defendants, their agents, successors, and employees from engaging in such conduct.

B. Render such judgment of damages on behalf of Plaintiffs Carlton Johnson and Sharon Johnson as this Court deems just and equitable against defendants Allan Olson, M.D., Michael Morris, M.D., John Stuemky, M.D., and Cynthia Houdesheldt, M.D., in their individual capacities.

C. Render such judgment of damages on behalf of Plaintiffs Frieda Smith and John Smith for the death of their son, Stonewall Jackson Smith, for the destruction of

the parent-child relationship, and for grief and loss of companionship resulting from the death of Stonewall Jackson Smith as the Court deems just and equitable against Defendants Jerry D. Razook, M.D., Gregory Herbeck, M.D., and John Stuemky, M.D., in their individual capacities;

D. Render such judgment of damages on behalf of Plaintiff Cheparney Camp for the death of his daughter, Melissa Camp, for the destruction of the parent-child relationship, and for grief and loss of companionship resulting from the death of Melissa Camp as the Court deems just and equitable against Defendants Richard H. Gross, M.D., Webb Thompson, M.D., Thomas Pratt, M.D., J. Patrick Livingston, M.D., and William Craig, M.D., in their individual capacities.

E. Allow Plaintiffs their costs herein and reasonable attorneys' fees; and

F. Allow such other, additional, or alternative relief as may appear to the Court to be equitable and just.

NINTH CAUSE OF ACTION

Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 123 as fully set forth herein.

124. Defendants' conduct as described failed to meet the accepted standard of medical care, rendering Defendants liable for damages to Plaintiff Carlton Johnson.

125. As a result of Defendants' conduct as described in paragraph 124, Defendants have caused Plaintiff Carlton Johnson actual damages in the amount of $8,000,000.00

126. Plaintiffs further allege that Plaintiff Carlton Johnson is entitled to recover punitive damages in the amount of $10,000,000.00;

WHEREFORE, Plaintiffs respectfully pray this Court to:

A. Render plaintiff Carlton Johnson, by and through his next friend Sharon Johnson, actual damages against defendants Allan Olson, M.D., Michael Morris, M.D., John Stuemky, M.D., and Cynthia Houdesheldt, M.D., in their individual capacities in the amount of $8,000,000.00;

B. Render Plaintiff Carlton Johnson, by and through his next friend Sharon Johnson, punitive damages against defendants Allan Olson, M.D., Michael Morris, M.D., John Stuemky, M.D., and Cynthia Houdesheldt M.D., in their individual capacities in the amount of $10,000,000.00;

C. Allow Plaintiff Carlton Johnson, by and through his next friend Sharon Johnson, his costs herein and reasonable attorneys' fees; and

D. Allow such other, additional, or alternative relief as may appear to the Court to be equitable and just.

TENTH CAUSE OF ACTION

Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 126 as fully set forth herein.

127. Defendants' conduct, as described in paragraphs 92 to 94 with respect to Stonewall Jackson Smith, a deceased infant, failed to meet the accepted standard of medical care pursuant to 12 Okla. Stat. Ann. §1054, rendering Defendants liable for damages.

128. As a result of Defendants' conduct as described in paragraph 127, Defendants have caused actual damages in the amount of $2,000,000.00

129. Plaintiffs further allege that Frieda and John Smith, surviving parents of Stonewall Jackson Smith, deceased infant, are entitled to recover punitive damages in the amount of $10,000,000.00.

WHEREFORE, Plaintiffs respectfully pray this Court to:

A. Render Plaintiffs Frieda Smith, and John Smith for the death of Stonewall Jackson Smith, actual damages against Jerry D. Razook, M.D., Gregory Herbeck, M.D., and John Stuemky, M.D., in the amount of $2,000,000.00.

B. Render Plaintiffs Frieda Smith and John Smith, for the death of Stonewall Jackson Smith, punitive damages against Jerry D. Razook, M.D., Gregory Herbeck, M.D., and John Stuemky, M.D., in the amount of $10,000,000.00.

C. Allow Plaintiff Frieda Smith and John Smith their costs herein and reasonable attorneys' fees; and

D. Allow such other, additional, or alternative relief as may appear to the Court to be equitable and just.

ELEVENTH CAUSE OF ACTION

Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 129 as fully set forth herein.

130. Defendants' conduct, as described in paragraphs 95 to 97 with respect to Melissa Camp, failed to meet the accepted standard of medical care pursuant to 12 Okla. Stat. Ann. §1054, rendering Defendants liable for damages.

131. As a result of defendants' conduct as described in paragraph 130, Defendants have caused actual damages in the amount of $2,000,000.00, respectively.

132. Plaintiffs further allege that Plaintiff Cheparney Camp, surviving parent of Melissa Camp is entitled to recover punitive damages in the amount of $10,000,000.00.

WHEREFORE, Plaintiffs respectfully pray this Court to:

A. Render Plaintiff Cheparney Camp, for the death of Melissa Camp, actual damages against Richard H. Gross, M.D., Webb Thompson, M.D., Thomas Pratt, M.D., J. Patrick Livingston, M.D., and William Craig, M.D., in the amount of $2,000,000.00.

B. Render Plaintiff Cheparney Camp, for the death of Melissa Camp, punitive damages against Richard H. Gross, M.D., Webb Thompson, M.D., Thomas Pratt, M.D.,

J. Patrick Livingston, M.D., and William Craig, M.D., in the amount of $10,000,000.00.

C. Allow Plaintiff Cheparney Camp his costs herein and reasonable attorneys' fees; and

D. Allow such other, additional, or alternative relief as may appear to the Court to be equitable and just.

Respectfully submitted,

/s/ Benjamin Lampkin
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*For Causes of Action One through Seven only.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CARLTON JOHNSON, et al., *Plaintiffs,*	)	
v.	)	No. CIV-85-2434-A
RICHARD GROSS, M.D., et al., *Defendants*	)	

ORDER

After hearing argument on defendants' motions to dismiss the amended complaint, and considering all briefs, including supplemental material the Court invited during oral argument, the Court ruled as follows:

1. Plaintiffs' first cause of action is dismissed. The language of 29 U.S.C. § 794, § 504 of the Rehabilitation Act is clear and requires no resort to extrinsic clues for its construction. The proscribed conduct is discrimination against an "otherwise qualified individual" "solely by reason of his handicap." The focus is on the affected individual himself relative to his qualifications for the benefit in question. When the intervention of parental decision, well based on adequate medical briefings or not, necessarily lies in the path of the infant's receipt of the benefit, it cannot be said either that the infant is otherwise qualified or that discrimination is soley because of handicap. In the Court's opinion, defendants properly cite *United States v. University Hospital, State University of New York at Stony Brook*, 725 F.2d 144 (2d Cir. 1984) in support of the proposition that § 504 is inapposite to this case.

2. Plaintiffs' second cause of action is dismissed. The establishment of institutional review boards is authorized pursuant to 45 U.S.C. § 289(a). However, § 289(c) does not give plaintiffs a cause of action for failure to register a research project without board approval. No private cause of action was created by § 289(a).

3. The Spina Bifida Association of America and the Association for Persons With Severe Handicaps have standing to sue. Defendants' motions are denied as to the associations.

4. Plaintiffs' prayer for injunctive relief will not be stricken.

5. The state doctors have sovereign immunity against plaintiffs' pendent state claims, Counts 9-11, pursuant to *State v. Martin*, 570 P.2d 623 (Okla. 1977).

6. Plaintiffs' constitutional claims are not dismissed.

It is so ORDERED this 22nd day of June, 1987.

WAYNE E. ALLEY
United States District Judge

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

CARLTON JOHNSON, by Sharon Johnson as his next friend; STONEWALL JACKSON SMITH, deceased, by and through Frieda Smith and John Smith; MELISSA CAMP, deceased, by and through Cheparney Camp; and THE SPINA BIFIDA ASSOCIATION OF AMERICA;

Plaintiffs-Appellants,

and

SHARON JOHNSON; and THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS, individually and on behalf of others similarly situated,

Plaintiffs,

v.

WEBB THOMPSON, M.D., Chief of Staff and Medical Director, Oklahoma Children's Memorial Hospital, in his individual and official capacities; JERRY D. RAZOOK, M.D., Attending Assistant Professor of Pediatrics, Pediatric Cardiology Service, Oklahoma Children's Memorial Hospital, in his individual capacity; GREGORY HERBECK M.D., Intern Department of Pediatrics, Oklahoma Children's Memorial Hospital, in his

No. 90-6107

(Filed Aug. 6, 1992)

individual capacity; CYNTHIA HOUDESHELDT, M.D., in her individual capacity; RICHARD H. GROSS, M.D., in his individual capacity; WILLIAM R. BURKETT, PATTY EATON, REGINALD BARNES, W.E. FARHA, JOSEPH W. STAFFORD, JANE HARTLEY, VIRGINIA KIDD, JOHN E. ORR, WAYNE C. CHANDLER, Members, Oklahoma Commission for Human Services; ROBERT BONAR, Administrator, Children's Hospital of Oklahoma; ANDREW A. LASSER, C.E.O., Oklahoma Medical Center; RON DORRIS, Chief Operation Officer, Oklahoma Medical Center; LAURA TULL, R.N.; RUTH TATYREK, M.S.W.; JOHN STUEMKY, M.D.; MICHAEL P. MORRIS, M.D.; BENJAMIN DEMPS, JR., Director, Oklahoma Department of Human Services; J. ANDREW SULLIVAN, M.D.; DAVID YNGVE, M.D.; WILLIAM E. BARNES, M.D.; HARRIET COUSSONS, M.D.; and ALAN OLSON, M.D.,

Defendants-Appellants,

and

THOMAS PRATT, M.D., J. PATRICK LIVINGSTON, M.D., and W.J. CRAIG, M.D., in their individual capacities,

Defendants.

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. CIV-85-2434-A)

Larry A. Tawwater of Lampkin, McCaffrey & Tawwater, Oklahoma City, Oklahoma (Ben T. Lampkin and Jo L. Slama of Lampkin, McCaffrey & Tawwater, Oklahoma City, Oklahoma, and James Bopp, Jr., Thomas J. Marzen, and Mary M. Nimz of The National Legal Center for the Medically Dependent and Disabled, Inc., Indianapolis, Indiana, with him on the brief) for Plaintiffs-Appellants Carlton Johnson, Stonewall Jackson Smith, and Melissa Camp.

St. John Barrett, Washington, D.C., on the brief for Plaintiff-Appellant the Spina Bifida Association of America.

Robert C. Margo (John Wiggins and Cynthia L. Sparling with him on the brief) of Short Barnes Wiggins Margo & Adler, Oklahoma City, Oklahoma, for Defendants-Appellees Richard Gross, M.D., J. Andrew Sullivan, M.D., David Yngve, M.D., William Barnes, M.D., Harriet Coussons, M.D., Webb Thompson, M.D., Jerry Razook, M.D., Gregory Herbeck, M.D., John Stuemky, M.D., Alan Olson, M.D., and Cynthia Houdesheldt, M.D.

John G. Fears, Assistant General Counsel, Department of Human Services, Oklahoma Commission for Human Services, Oklahoma City, Oklahoma, for Defendants-Appellants Benjamin Demps, Jr., William R. Burkett, Patty Eaton, Reginald Barnes, W.E. Farha, Joseph W. Stafford, Jane Hartley, Virginia Kidd, John E. Orr, Wayne C.

Chandler, Robert Bonar, Andrew A. Lasser, Ron Dorris, Laura Tull, R.N., and Ruth Tatyrek, M.S.W.

Before **HOLLOWAY** and **EBEL**, Circuit Judges, and **OWEN**, District Judge.*

EBEL, Circuit Judge.

This appeal requires us to confront a variety of issues regarding the medical treatment provided to certain infants born with spina bifida. We address primarily whether the infants' rights under the Constitution and under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, were violated. The district court entered judgment for the defendants. We affirm.

I. Background

Plaintiffs-Appellants Carlton Johnson, Melissa Camp, and Stonewall Jackson Smith were all born with myelomeningocele ("MM"), a type of spina bifida, at Oklahoma Children's Memorial Hospital ("OCMH"). The appellants allege that they received discriminatory treatment based on their handicap and on their socioeconomic status. The parties sharply dispute many of the facts in

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* Honorable Richard Owen, Senior District Judge, United States District Court for the Southern District of New York, sitting by designation.

this case. However, the record supports the following factual background.

Defendant-appellee Dr. Richard H. Gross led a team of doctors and other health professionals ("the MM team") at OCMH who treated newborn infants with myelomeningocele. This treatment, which includes surgery and the administering of antibiotics, must take place soon after birth. In some cases, however, the infant will not survive even with treatment. In such cases, treating the infant merely prolongs his or her suffering.

In conjunction with his work at the hospital, Dr. Gross performed a study and published an article, entitled *Early Management and Decision Making for the Treatment of Myelomeningocele,* 72 Pediatrics 450 (1983). This study covered the period 1977 through 1982, during which time the MM team evaluated sixty-nine infants born with myelomeningocele. The MM team recommended "vigorous treatment," i.e., surgery and antibiotics, for thirty-six of the infants. One of these infants later died of unrelated causes; the rest survived. The team recommended "supportive care," i.e., no treatment other than making the infants as comfortable as possible, for the remaining thirty-three infants. The parents of five infants in the latter group rejected the recommendations, and three of these infants survived. Several other infants survived without treatment for several months and were subsequently treated. The remaining twenty-four infants receiving supportive care died.

The appellants allege that when the MM team made its recommendations, it considered both medical and nonmedical criteria, the latter including the parents'

socioeconomic status. The appellants allege that the MM team discriminated against infants who came from families that the team believed lacked the intellectual and financial resources to provide the appropriate continuing care for a child with MM. According to the appellants, the MM team was more likely to recommend only supportive care for infants from such families. The appellants further allege that the MM team did not inform parents of its consideration of such factors when it made its recommendation. Although the appellees argue that the parents made the ultimate treatment decision, parents of sixty-four of the sixty-nine infants followed the MM team's recommendation. Thus, the appellants argue, the MM team was the true decisionmaker.

Melissa Camp and Stonewall Jackson Smith were participants in the study. The team recommended, and each infant received, only supportive care; both died. Carlton Johnson was born after completion of the study, but while the team allegedly continued to use the study's criteria to make its recommendation. The MM team recommended and Johnson received only supportive care. He survived without treatment for seventeen months, when surgery was finally performed. He was still alive at the time of trial, but suffered a severe mental handicap allegedly due, in part, to the team's failure to treat him immediately.

The hospital changed its practice in 1984. Since then, all infants born with spina bifida have received vigorous treatment, with the exception of one infant for whom treatment clearly would have been futile.

The parents of Camp, Smith, and Johnson, on behalf of their children, together with the Spina Bifida Association of America ("SBAA") and the Association for Persons with Severe Handicaps ("the plaintiffs"), filed suit against the members of the MM team, various other physicians, and a number of state officials. The plaintiffs sought class certification on behalf of 156 potential members, all infants born with MM at OCMH during the pendency of the study and all those born afterward while OCMH allegedly continued to use the study criteria. In their complaint, the plaintiffs asserted causes of action from violations of rights arising under, among other sources, the Due Process Clause, the Equal Protection Clause, section 504 of the Rehabilitation Act of 1973 ("section 504"), and state law. The plaintiffs sought compensatory and punitive damages along with declaratory and injunctive relief.

The district court denied the plaintiff's application for class certification. In addition, the court dismissed, pursuant to Fed. R. Civ. P. 12(b)(6), the cause of action brought under section 504. It granted summary judgment in favor of the defendants on the claims for declaratory and injunctive relief and accordingly dismissed from the action all defendants against whom the plaintiffs had sought only such relief. The court also granted summary judgment in favor of defendant Dr. Alan Olson.

Trial commenced in 1990 against the remaining defendants on the plaintiffs' claims based on 42 U.S.C. § 1983 and state common law negligence. Prior to submitting the case to the jury, however, the district court directed verdicts in favor of the defendants on all claims asserted on behalf of plaintiff Stonewall Jackson Smith,

all claims asserted against defendants Dr. Gregory Herbeck and Dr. Jerry D. Razook, and all claims asserted under 42 U.S.C. § 1983. The court then submitted Carlton Johnson's and Melissa Camp's negligence claims against the remaining physician defendants to the jury, which found for the defendants.

Camp, Smith, and Johnson, together with the SBAA, filed a timely notice of appeal.[1] We have jurisdiction pursuant to 28 U.S.C. § 1291.

II. Section 504

The appellants argue that the district court erred in dismissing their cause of action under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Because the court dismissed this claim on the pleadings pursuant to Fed. R. Civ. P. 12(b)(6), we review its order de novo. *Avala v. Joy Mfg. Co.*, 877 F.2d 846, 847 (10th Cir. 1989).

At the time this action was brought, section 504 provided in relevant part:

> No otherwise qualified handicapped individual in the United States, as defined in [29 U.S.C. § 706(7)], shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency. . . .

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[1] For convenience, we will refer to the infants Camp, Smith, and Johnson as "the appellants."

29 U.S.C.A. § 794 (West 1985).[2] Thus, to state a claim under section 504, "a plaintiff must prove (1) that he is a 'handicapped individual' under the Act, (2) that he is 'otherwise qualified' for the [benefit] sought, (3) that he was [discriminated against] solely by reason of his handicap, and (4) that the program or activity in question receives federal financial assistance." *Strathie v. Department of Transp.*, 716 F.2d 227, 230 (3d Cir. 1983) (citation omitted); *see also Rothschild v. Grottenthaler*, 907 F.2d 286, 289-90 (2d Cir. 1990).

The district court held that "[w]hen the intervention of parental decision, well based on adequate medical briefings or not, necessarily lies in the path of the infant's receipt of the benefit, it cannot be said either that the infant is [']otherwise qualified['] or that the discrimination is [']solely['] because of handicap." R., Vol. I, Doc. 158, at 1. The appellants argue that if the MM team's actions rendered parental consent a sham, such "consent" cannot be considered an intervening cause that makes section 504 inapplicable. We agree with this argument by the appellants, but nonetheless conclude that the district court's dismissal of the section 504 claim was proper, albeit for different reasons.

Whether section 504 applies to "individual medical treatment decisions involving handicapped infants" is a controversial issue that the Supreme Court has expressly left open. *See Bowen v. American Hosp. Ass'n.*, 476 U.S. 610,

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[2] Section 504 was amended in 1986, after the appellants first filed this action, and again in 1988. Neither amendment substantively affects the meaning of the section as relevant to the instant appeal.

624 (1986) (plurality opinion). The appellants argue that the MM team's conduct constituted discrimination in violation of section 504 based on two principal grounds. They argue primarily that the team recommended only supportive care for Camp, Smith, and Johnson because their families were of low socioeconomic status. They argue secondarily that, in general, the team recommended supportive care for those infants as to whom they anticipated a greater degree of handicap. In addition, the SBAA makes a third argument that the hospital discriminated against *all* infants born with MM. We deal with each argument in turn.

A. Discrimination Based on Socioeconomic Status

In essence, the appellants argue that but for (1) having spina bifida and (2) being of low socioeconomic status, the MM team would not have recommended that they receive only supportive care. Because of the discrimination based on these two conditions, the appellants assert a violation of section 504. To evaluate their claim, we consider whether the appellants have met section 504's four conditions.

The Supreme Court's decision in Bowen establishes that the first condition – that infants born with spina bifida are "handicapped individuals" under the Rehabilitation Act of 1973 – has been met. Although the Supreme Court did not issue a majority opinion in that case, seven Justices agreed that the term encompasses "an infant who is born with a congenital defect." *See Bowen*, 476 U.S. at 624 (opinion of Stevens, J., joined by Marshall,

Blackmun & Powell, JJ.); *id.* at 652 (opinion of White, J., joined by Brennan & O'Connor, JJ.).

The appellants' complaint fails to satisfy both the second and third conditions. However, for purposes of our holding with regard to these particular allegations, we need address only the third condition, that the discrimination resulted "solely by reason of [the] handicap." 29 U.S.C. § 794. In essence, the appellants argue that the team discriminated against them in relation to other infants with spina bifida because of their low socioeconomic status. Section 504, by its very terms, does not cover discrimination among similarly handicapped persons. *See Clark v. Cohen*, 613 F. Supp. 684, 693 (E.D. Pa. 1985), *aff'd on other grounds*, 794 F.2d 79 (3d Cir.), *cert. denied*, 479 U.S. 962 (1986). The word *solely* provides the key: the discrimination must result from the handicap and from the handicap alone. If others with the same handicap do not suffer the discrimination, then the discrimination does not result "solely by reason of [the] handicap." Here, the appellants allege that the discrimination resulted at least in part from their low socioeconomic status. That discrimination is not actionable under section 504. Accordingly, we hold that the district court correctly dismissed the causes of action based on those allegations for failure to state a claim under section 504.

B. Discrimination Based on Degree of Handicap

The appellants argue that the MM team "used the anticipated degree of handicap as a basis for recommending that beneficial medical treatment not be provided"

and in so doing violated section 504. Corrected Br. in Chief of Appellants Carlton Johnson, Stonewall Jackson Smith and Melissa Camp at 30 [hereinafter Appellants' Br. in Chief]. We reject this argument because the appellants fail to satisfy the second condition of section 504, that they were "otherwise qualified" for the treatment they did not receive.

The "otherwise qualified" language, when considered in conjunction with the "solely" language of the third condition, poses a formidable obstacle for anyone alleging discrimination in violation of section 504 based upon the failure to receive medical treatment for a birth defect. Such a plaintiff must prove that he or she was discriminatorily denied medical treatment because of the birth defect and, at the same time, must prove that, in spite of the birth defect, he or she was "otherwise qualified" to receive the denied medical treatment. Ordinarily, however, if such a person were not so handicapped, he or she would not need the medical treatment and thus would not "otherwise qualify" for the treatment.

We agree, therefore, with the Second Circuit's analysis in *United States v. University Hospital, State University of New York at Stony Brook*, 729 F.2d 144 (2d Cir. 1984). In that case, the court considered the application of section 504, and its second requirement in particular, to infants born with multiple birth defects. The court stated that the term *otherwise qualified* cannot ordinarily be applied "in the comparatively fluid context of medical treatment decisions without distorting its plain meaning. In common parlance, one would not ordinarily think of a newborn infant suffering from multiple birth defects as being

'otherwise qualified' to have corrective surgery performed." *Id.* at 156. The court reasoned, "[w]here the handicapping condition is related to the condition(s) to be treated, it will rarely, if ever, be possible to say . . . that a particular decision was 'discriminatory.' " Id. at 157.[3]

C. Discrimination Against All Infants with MM

The SBAA argues that the team discriminated against all infants with MM by designating them as subjects of a medical research project without their parents' knowledge or consent. Because all infants with MM were part of the study during its pendency, the SBAA contends the

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[3] Several jurists have hypothesized situations in which the handicap that forms the basis of the section 504 discrimination bears no relation to the medical treatment sought but denied. For example, Justice White stated in *Bowen*:

> An esophageal obstruction, for example, would not be part and parcel of the handicap of a baby suffering from Down's syndrome, and the infant would benefit from and is thus otherwise qualified for having the obstruction removed in spite of the handicap. In this case, the treatment is completely unrelated to the baby's handicapping condition. If an otherwise normal child would be given the identical treatment, so should the handicapped child if discrimination on the basis of the handicap is to be avoided.

Bowen, 476 U.S. at 655 (footnote omitted) (White, J., dissenting); *see also University Hospital*, 729 F.2d at 162 (Winter, J., dissenting). We do not decide whether section 504 might apply in such a situation, but it would seem that the "otherwise qualified" condition might be satisfied under such a scenario. *See Glanz v. Vernick*, 750 F. Supp. 39, 45-46 (D. Mass. 1990) (AIDS patient denied treatment for ear perforation stated claim under section 504). We do not find such a situation here.

discrimination was "solely" due to the handicap, thereby meeting the third condition.

Under this argument, the appellants still fail to satisfy the second condition. The infants required the medical treatment sought only because they were born with MM. Thus, they were not "otherwise qualified" to receive the medical treatment denied to them because of the alleged discrimination.

Section 504 proscribes discrimination between the nonhandicapped and the "otherwise qualified" handicapped. It does not create any absolute substantive right to treatment. As the plurality stated in *Bowen*, " 'Section 504 seeks to assure evenhanded treatment'; 'neither the language, purpose, nor history of [section] 504 reveals an intent to impose an affirmative-action obligation' on recipients of federal financial assistance." *Bowen*, 476 U.S. at 640 (plurality opinion) (citations omitted). The plurality also noted that "nothing in the legislative history . . . even remotely suggests that Congress contemplated the possibility that 'section 504 could or would be applied to treatment decisions[] involving defective newborn infants.' " *Id.* at 645 n.33 (citation omitted; alteration added). Without a showing that the nonhandicapped received the treatment denied to the "otherwise qualified" handicapped, the appellants cannot assert that a violation of section 504 has occurred.

In sum, we hold that the appellants failed to state a claim for violation of section 504 and that the district court therefore did not err in dismissing the claim brought under this section.

III. Section 1983

In their complaint below, the appellants asserted that discrimination based on socioeconomic factors violated their procedural due process and equal protection rights, that the MM team's failure to provide vigorous treatment violated their substantive due process rights, that discrimination on the basis of handicap violated their rights under section 504, and that the MM team's recommendations deprived the parents of the opportunity to make decisions regarding their children's care in violation of their fundamental right to privacy. For each of these alleged violations of federal rights, the appellants brought a cause of action under 42 U.S.C. § 1983. The district court granted the appellees' motions for directed verdicts on all of these causes of action. The appellants now argue that the district court erred in doing so.

We review de novo the district court's ruling on a motion for directed verdict. *Hill v. Goodyear Tire & Rubber. Inc.*, 918 F.2d 877, 880 (10th Cir. 1990). We look to the record to see if the evidence, construed in the light most favorable to the nonmoving party, supports only one resolution of the issue. *See Ralston Dev. Corp. v. United States*, 937 F.2d 510, 512 (10th Cir. 1991).

A. Discrimination on the Basis of Socioeconomic Status

The appellants argue that discrimination on the basis of socioeconomic status violates their right to due process and equal protection. The district court directed a verdict on this issue after concluding that no evidence supported the claim:

> The article makes reference to socioeconomic factors as being considered, theoretically, but we don't have any evidence here that the children who were selected for [vigorous] treatment enjoyed a socioeconomic status any different from the ones that were recommended for supportive [care]. We don't have any evidence that wealthy parents' babies lived and poor parents' babies died; we don't have any evidence of a racial basis or anything other than a medical determination based upon degree of handicap and not on mere presence of handicap.

R., Vol. XX, at 592.

On appeal, the appellants argue that "[t]he constitutional right to be free from discrimination requires no citation." Appellants' Br. in Chief at 38. However, the district court did not direct a verdict because of a defect in the appellants' legal theory – it directed the verdict because of a lack of evidence. The appellants do not point us to any evidence that the district court may have overlooked. Indeed, they do not discuss the evidence at all.

The appellants presented as evidence only Dr. Gross' article, which indicates that the MM team considered socioeconomic factors in making its recommendation. However, the appellants presented no evidence that these factors affected the outcome of the recommendations in their individual cases. In other words, there is no evidence to establish that the appellants' socioeconomic status was a factor that caused the recommendation that they receive only supportive care. After our review of the record, we therefore agree with the district court that the appellants presented no evidence of discriminatory harm

and that the district court correctly granted the motion for a directed verdict.

B. Substantive Due Process

The appellants argue that the appellees' conduct violated their substantive due process rights by depriving them of their liberty interests in their own lives. Because of this deprivation, the appellants urge us to reverse the district court's decision to direct a verdict for the appellees on the appellants' section 1983 claim based on substantive due process.

The Due Process Clause does protect an interest in life. *E.g., Cruzan v. Director, Missouri Dep't of Health,* 110 S. Ct. 2841, 2853 (1990). It does not follow, however, that the state necessarily has a constitutional duty to take affirmative steps to preserve life. In *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189 (1989), the Supreme Court explained:

> The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.

Id. at 195.

In effect, the appellants argue that substantive due process implies a right to treatment. Such a right exists

only in narrow circumstances, however. Specifically, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Id.* at 199-200 (citations omitted); *see Youngberg v. Romeo*, 457 U.S. 307, 324 (1982) (involuntarily committed mental patient entitled to adequate medical care).

Infants born with spina bifida do not fall into the above category; accordingly, such infants cannot claim a constitutional right to treatment. Without such a right, the appellants cannot claim a deprivation of their liberty interest if the state failed to treat them. *Cf. DeShaney*, 489 U.S. at 196-97 ("If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them.") (footnote omitted).

The fact that the state did provide some medical services does not alter this analysis. The First Circuit recently stated in an analogous situation involving a section 1983 claim:

> Although the [state] may have played some causal role in the harm, it did so only because [the plaintiff] voluntarily availed himself of a [state] service. The [state] did not force [the plaintiff], against his will, to become dependent upon it. Thus, the [state's] actions, while possibly negligent or even willfully indifferent or reckless, did not take on the added character of violations of the federal Constitution.

Monahan v. Dorchester Counseling Center, Inc., 961 F.2d 987, 993 (1st Cir. 1992). Similarly, the fact that the appellants had received some medical benefits at OCMH did not entitle them to further treatment based on substantive due process.

We accordingly affirm the district court's decision to grant a directed verdict for the appellees on the appellants' section 1983 cause of action for violation of their substantive due process rights.

C. Section 504

The appellants assert a violation of their rights under section 504. We held in Part II of this opinion that no violation occurred, even taking all of the appellants' allegations as true. We therefore hold that the district court did not err in directing a verdict for the appellees on the appellants' section 1983 claim for violation of rights secured by section 504.

D. Parental Rights

The parents argue that the MM team deprived them of the right to choose what type of medical care their children should receive. They contend that this right is inherently part of the right to privacy protected by the Fourteenth Amendment. Thus, they argue, the district court erred in directing a verdict for the appellees on their section 1983 cause of action for violation of their right to privacy.

The parents did not file a notice of appeal in their own right, however, but rather took this appeal only as representatives of the infants. If a party's name does not appear in a timely filed notice of appeal, that party has not appealed any adverse judgment. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314-18 (1988). The parents therefore are not parties to this appeal except as representatives of the infants,[4] and they have no standing to assert claims on their own behalf. Accordingly, we have no jurisdiction to hear the parents' argument regarding violation of their own rights.

IV. Denial of Discovery of Identities of Study Participants

The appellants argue that the district court erred in denying their motion to compel discovery of the names of all participants in the MM team's study. We review orders relating to discovery for an abuse of discretion. *See Willner v. Budig*, 848 F.2d 1032, 1035-36 (10th Cir. 1988), *cert. denied*, 488 U.S. 1031 (1989). We hold that the district court did not abuse its discretion in denying the motion.

The magistrate who initially decided the appellants' motion concluded that the privacy interests of the other study participants outweighed the appellants' need for the information. The appellants appealed this decision to

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[4] Sharon Johnson, Carlton Johnson's mother, originally appeared as a plaintiff. She voluntarily dismissed her claims without prejudice and is no longer a party except as a representative of her son. *See* R., Vol. V, Doc. 469, at 2.

the district court, which upheld the magistrate's judgment.

The appellants argue that the information sought went to the heart of their allegations. The appellants presented the MM team's article as preliminary evidence. The members of the team contend, however, that they did not actually make "recommendations" to the parents, but rather only presented options to them, and that they did not actually base medical decisions on socioeconomic data. Thus, the appellants sought testimony from other study participants to show the existence of a concerted plan to use socioeconomic criteria in making recommendations for appropriate treatment and to refute the appellees' contention that they merely presented options to parents who made the final choice. To obtain such testimony, the appellants sought to learn the identities of these other participants.

The decision whether to administer heroic life-sustaining treatment to a severely handicapped newborn is one of the most heartwrenching decisions a parent can be called upon to make. *See American Academy of Pediatrics v. Heckler,* 561 F. Supp. 395, 396-97 (D.D.C. 1983). Parents who have had to make such a decision are entitled to privacy and confidentiality. We believe that the magistrate was correct to balance the relevance and necessity of the information the appellants requested against the rights of other participants to maintain their privacy. *See Lukaszewicz v. Ortho Pharmaceutical Corp.,* 90 F.R.D. 708, 709 (E.D. Wis. 1981).

The appellees did provide information about the care rendered to each participant in the study. However, the

appellees did not disclose the identities of the other infants. Thus, if the appellants desired to impeach the appellees' representations regarding treatment to those other infants, the appellants had to ascertain the identities of the infants' families through other means. That no doubt presented a difficult – perhaps impossible – task for the appellants. Nonetheless, given the important interests of the other infants and their families to preserve the confidential nature of their contacts with the physicians and the hospital, we cannot say that the magistrate abused his discretion in refusing to order this discovery.

V. Other Issues

The appellants raise a number of other issues, which we need only discuss briefly.

A. Statute of Limitations

The appellants argue that the district court erred in submitting to the jury the issue of whether Melissa Camp's negligence claim was time-barred. Because her father testified without contradiction that he did not learn of the MM team's actions until 1986, the appellants argue that the district court should have directed a verdict on this issue in favor of Melissa Camp. Instead, the court submitted the issue to the jury, which decided that Melissa Camp's claims were barred by the statute of limitations.

Under Oklahoma law, the relevant statute of limitations requires that a plaintiff bring a suit within "two

years from the date [the] plaintiff knew or should have known, through the exercise of reasonable diligence[,] of the existence of the death, injury or condition complained of." *Redwine v. Baptist Medical Center of Okla., Inc.*, 679 P.2d 1293, 1295 (Okla. 1983). Moreover, "[w]hether plaintiff exercised 'reasonable diligence' in ascertaining the cause of . . . death is a question of fact to be determined by the jury." *Id.* Because the issue was not when Melissa's father learned of the relevant facts, but rather when he should have learned of them, the district court properly denied the motion for a directed verdict.[5]

B. Class Certification

The appellants contend that the district court erred in denying their application for class certification. We review the district court's decision for abuse of discretion. *Pilots Against Illegal Dues v. Air Line Pilots Ass'n*, 938 F.2d 1123, 1134 (10th Cir. 1991). The district court held that the number of infants denied vigorous treatment was too small to meet the numerosity requirement of Fed. R. Civ. P. 23(a)(1). Given our deferential standard of review, we cannot say that the court's decision was in error. *See Rex v. Owens*, 585 F.2d 432, 436 (10th Cir. 1978) ("no set formula" to determine whether numerosity requirement was met; instead, this is a fact-specific inquiry best left to discretion of district court).

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[5] In view of our resolution of this issue, the appellee's Motion to Strike Juror Affidavit and Request for Corrected Brief in Chief is moot.

C. Declaratory and Injunctive Relief

The appellants argue that the district court erred in granting summary judgment to the appellees on the claims for declaratory and injunctive relief. Declaratory relief is discretionary, *Green v. Mansour*, 474 U.S. 64, 72 (1985), and we find no abuse of that discretion in the court's declining to exercise jurisdiction over the appellants' claims for such relief. With regard to injunctive relief, we agree with the district court that the appellants' failure to present any evidence of continuing discrimination since 1984 renders concerns of future recurrence purely speculative. We therefore affirm the district court's grant of summary judgment on these issues.

D. Jury Instructions

The appellants argue that the district court instructed the jury incorrectly regarding the differing standards of conduct applicable to appellees Dr. Gross and Dr. Thompson. We find no error in the district court's reliance on *Fox v. Oklahoma Memorial Hospital*, 774 P.2d 459 (Okla. 1989), which held that a plaintiff must show gross negligence to overcome the sovereign immunity enjoyed by a physician employed at a state hospital at the time of Melissa Camp's birth. *Id.* at 461. Furthermore, the court specifically explained to the jury that it was to apply a different standard of negligence to Carlton Johnson's claims because they arose at a time when Oklahoma law was different. *See* R., Vol. V, Doc. 480, Instruction No. 15.

The appellants also challenge the adequacy of the informed consent instruction given to the jury. However, the appellants failed to object to the instruction below, and on review we do not find the instruction to be plain error.

E. Summary Judgment for Dr. Olson

The appellants appeal the district court's denial of their motion for reconsideration of the dismissal of appellee Dr. Alan Olson on summary judgment. The standard of review for the denial of a motion for reconsideration depends on the nature of the underlying decision. *See Federal Kemper Ins. Co. v. Rauscher*, 807 F.2d 345, 348-49 (3d Cir. 1986). In this case, because the motion was for reconsideration of summary judgment, our review is de novo. *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). After reviewing the record, we agree with the appellees that Dr. Olson's status as an attending physician did not connect him sufficiently to the treatment decisions made and that summary judgment was appropriate.

F. Directed Verdicts for Dr. Herbeck and Dr. Razook

The appellants argue that the district court incorrectly directed verdicts for appellees Dr. Herbeck and Dr. Razook regarding the decision to administer supportive care to Stonewall Jackson Smith. The appellants had argued below that Smith's mother had not given informed consent to withhold vigorous treatment.

Under Oklahoma law, a plaintiff must prove that injury resulted in order to present a prima facie case of breach of duty to inform. *Scott v. Bradford,* 606 P.2d 554, 557-59 (Okla. 1979). The appellees sought to avoid liability by showing that Smith would not have survived even with vigorous treatment. In support, they introduced evidence that Smith suffered from anencephaly, a congenital absence of the brain; when such a condition is present, an infant cannot survive with or without treatment.

In response, the appellants introduced evidence that the test the appellees used to test for anencephaly was not always accurate. They also introduced testimony that Smith might have survived if the test were inaccurate and he did not have anencephaly. The appellants presented no evidence, however, that the test was in fact inaccurate in this particular case or that Smith would have survived. They therefore failed to show that an injury resulted from the lack of informed consent, as required under *Scott.* Under these circumstances, we affirm the district court's decision to direct a verdict.

G. Other Rulings

The appellants challenge various evidentiary rulings and a ruling denying a mistrial. After reviewing the record, we find no abuse of discretion on these rulings.

The appellants also list several other issues in their "Statement of the Issues," but fail to brief them. In general, we do not address issues not briefed. *See American Airlines v. Christensen,* No. 91-4047, 1992 U.S. App. Lexis

13614 at *14, n.8 (10th Cir. June 17, 1992) ("It is insufficient merely to state in one's brief that one is appealing an adverse ruling below without advancing reasoned argument as to the grounds for appeal.") (citing Fed. R. App. P. 28(a)(4), recodified as Fed. R. App. P. 28(a)(5)).

VI. Conclusion

Because we hold that the district court committed no reversible error, we AFFIRM its judgment.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CARLTON JOHNSON by SHARON JOHNSON, as his next friend, et al.,	)	
Plaintiffs,	)	No. CIV-85-2434-A
v.	)	
RICHARD H. GROSS, M.D., in his individual capacity, et al.,	)	
Defendants.	)	

ORDER

(Filed June 27, 1989)

Before the Court in this case is defendants' joint motion for partial summary judgment. Defendants seek partial summary judgment under Fed. R. Civ. P. 56(d) on plaintiffs' claims for injunctive and declaratory relief on the ground that the discriminatory practices of which plaintiffs complain do not represent an ongoing harm, and are incapable of repetition. The defendants against whom only injunctive and declaratory relief is sought also seek dismissal from this action.

Plaintiffs bring this action both on their own behalf and on behalf of all children with myelomeningocele who have been, are, or may in the future be evaluated or treated by the myelomeningocele team or its members at Oklahoma Children's Memorial Hospital (OCMH), and on behalf of their parents and legal guardians. Amended

Complaint, p. 6, para. 32. Plaintiffs' allege that defendants, medical service providers and administrators at OCMH, and others, discriminate against infants born with myelomeningocele by basing treatment decisions on non-medical social and economic criteria, such as the family's economic and intellectual resources, geographic location of their home, and the child's projected intellectual capacity. Plaintiffs allege that the use of such criteria constitutes discrimination in violation of their substantive and procedural due process rights, and rights to equal protection under the Fourteenth Amendment. Causes of action 1-8 of plaintiffs' First Amended Complaint seek declaratory and injunctive relief, as well as monetary damages. These causes of action pray that the Court both declare that defendants have engaged in unlawful conduct and also enjoin defendants from further engaging in such conduct.

(1) Injunctive Relief

A claim for injunctive relief is appropriate only where a plaintiff demonstrates that he faces a risk of continuing harm. Evidence of past injury alone is insufficient to warrant an injunction. *Palmer v. City of Chicago,* 755 F.2d 560, 572 (7th Cir. 1985); *O'Shea v. Littleton,* 94 S.Ct. 669, 676 (1974). In addition, to maintain a claim for injunctive relief a plaintiff must show more than a mere speculative or theoretical possibility of future harm. There must be some realistic likelihood that the alleged past harm will be repeated. *City of Los Angeles v. Lyons,* 103 S.Ct. 1660, 1668-1670 (1983).

The Court finds that plaintiffs have failed to show any more than a speculative possibility of future discriminatory treatment by defendants, either with respect to the named plaintiffs, or with respect to present and future infants with myelomeningocele who will be evaluated by defendants. Although this case has been pending over three years, and extensive discovery has been conducted, plaintiffs have produced no evidence that defendants have engaged in any selective discriminatory treatment of newborns since 1984. On the contrary, the undisputed evidence submitted by defendants reveals that all newborns under defendants' care since 1984, with the exception of one for whom surgical treatment would have been futile, have received aggressive treatment. *See* Summary of Defendants' Answers to Interrogatory No. 19, Exhibit 3, Defendants' Motion. This evidence strongly suggests that any unlawful discrimination practiced by defendants has long since ceased. Reasonable jurors could not find that defendants pose a risk of continuing harm to children with myelomeningocele presenting at OCMH. Fed. R. Civ. P. 56(c) mandates the entry of summary judgment, after adequate time for discovery, against a party who has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. *Celotex Corp. v. Catrett*, 91 L.Ed.2d 265, (1986); *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986).

Plaintiffs' argument in support of their proposition that a factual issue exists as to whether discriminatory medical treatment is ongoing is unpersuasive. Plaintiffs rely on deposition testimony by Cara Madison, Cheparney Camp, and Frieda Smith, relatives of the infant plaintiffs in this case, that, prior to the filing of this

action, defendants denied them any real choice as to treatment of their children. This evidence, however, relates only to defendants' past conduct at the time defendants were evaluating the named plaintiff infants. It does not constitute evidence of any existing or future threat of unlawful conduct for which an injunction might lie.

With respect to the risk of future harm to the named plaintiffs in this case, both Melissa Camp and Stonewall J. Smith are deceased. Injunctive relief as to them is therefore clearly inappropriate. Carlton Johnson, however, is surviving and remains an outpatient at OCMH. Although Carlton Johnson has been under defendants' care since his birth in September 1982, plaintiffs have produced no evidence of discriminatory medical treatment of him since October, 1982. Plaintiffs' evidence of a continuing threat of harm to Carlton Johnson consists entirely of unsubstantiated and inadmissible statements of opinion, not based on personal knowledge, by Sharon Johnson, Carlton Johnson's mother. Plaintiffs' Response Brief, p. 10-11. Such statements are not competent evidence for resisting summary judgment on defendants' claims for injunctive relief. Based on the evidence before the Court, reasonable jurors could not find that Carlton Johnson presently faces a realistic likelihood of future discriminatory treatment by defendants.

(2) Declaratory Relief

Having resolved the injunctive relief issue, we now turn to plaintiffs' claims for declaratory relief. The Declaratory Judgment Act is enabling act, which confers

a discretion on the court, rather than an absolute right on the litigant. *Green v. Mansour,* 88 L.Ed.2d 371, 379 (1985); *Public Service Comm. v. Wycoff Co.,* 73 S.Ct. 236, 239 (1952).

The Court in its discretion declines jurisdiction over plaintiffs' declaratory relief claims for several reasons. First, declaratory relief is appropriate only where the facts show "a substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 85 L.Ed. 826, 829 (1941). As seen above in our discussion of injunctive relief, plaintiffs have failed to show that their controversy retains a quality of immediacy due to an imminent threat of harm.

Second, the declaratory judgment remedy is ordinarily limited to cases where the rights to be protected have not yet been invaded, or where the wrongs to be prevented not yet committed to the extent of actionable damage. Where the wrongful acts complained of have already been committed and the cause of action already exists, declaratory relief will not lie. 26 C.J.S. Declaratory Judgments § 17 (1956); *Cincinnati Shoe Mfg. Co. v. Vigorith,* 212 F.2d 583 (6th Cir. 1954). Plaintiffs in this case are complaining that their rights have already been violated by wrongful acts already committed by defendants.

Third, a declaratory judgment proceeding is primarily intended to construe the meaning of a law, not to determine the existence of controverted facts. A court should ordinarily refuse a declaratory judgment which can be made only after a judicial investigation of disputed facts. *United Mine Workers of America v. Roncco,* 314 F.2d 186 (10th Cir. 1963), *on remand,* 232 F.Supp. 865 (D.

Wyo. 1964); *Allstate Ins. Co. v. Philip Leasing Co.*, 214 F.Supp. 273, 276 (W.D. So. Dakota 1963). The present case will turn largely on questions of fact to be resolved at trial. A crucial fact question is whether defendants in fact applied discriminatory criteria in selecting infants for beneficial treatment. Such fact questions make declaratory relief inappropriate in this case.

Finally, the declaratory judgment remedy is ordinarily not appropriate where another equally or more important remedy is already available for the issues or rights sought to be determined or declared. *Employers' Liability Assurance Corp. v. Mitchell*, 211 F.2d 441, 443 (5th Cir. 1954). This is particularly so where the case is already ripe for relief by such remedy. *Dresser Industries, Inc. v. Insurance Co. of No. America*, 358 F.Supp. 327, 330 (N.D. Tex 1973), *aff'd*, 475 F.2d 1402 (5th Cir. 1973). Plaintiffs have a fully adequate remedy for their alleged wrongs in their claim for monetary damages. The existence of this remedy makes declaratory relief unnecessary in this case.

Conclusion

For the above stated reasons, defendants are hereby granted summary judgment on plaintiffs' claims for injunctive and declaratory relief. Fed. R. Civ. P. 56(d). Consequently, those defendants against whom only injunctive or declaratory is sought, defendants Reginald Barnes, William Barnes, Chandler, Coussons, Doenitz, Eaton, Farhas, Furr, Greer, Hargis, Harris, Hartley, Kidd, Orr, Padilla, Stafford, Sullivan, Tatyrek, Toule, Tull, Walters, Watson, Yngve, and Children's Shelter, Inc. are hereby DISMISSED WITH PREJUDICE from this action.

Remaining for trial in this case are plaintiff's claims for monetary damages against defendants Craig, Gross, Herbeck, Houdesheldt, Livington, Morris, Olson, Pratt, Razook, Stuemky, and Thompson.

It is so ordered this 27th day of June, 1989.

/s/ Wayne E. Alley
WAYNE E. ALLEY
United States
District Judge

Entered in judgment docket 6-27-89